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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA,

EMBRACING A PORTION OF THE MARCH TERM, 1895, AND
THE JUNE TERM, 1895.

BY
FLETCHER MADDUX,
REPORTER.

VOLUME XVI.

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JUDGES
OF
The Supreme Court of the State of Montana
DURING THE TIME OF THESE REPORTS.

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. DE WITT, } Associate Justices.
HON. WILLIAM H. HUNT, }

OFFICERS OF THE COURT.

HENRI J. HASKELL, Attorney General.

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FLETCHER MADDOX, REPORTER.

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The Eleventh Judicial District embraces the Counties of Flathead and Teton; CHARLES W. POMEROY, Judge; residing at Kalispell.

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CASES DETERMINED
IN THE
SUPREME COURT

AT THE
MARCH TERM, 1895.

PRESENT:

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. HUNT, }
HON. WILLIAM H. DE WITT, } Associate Justices.

LOEBER, RESPONDENT, *v.* BUTTE GENERAL ELEC-
TRIC COMPANY, APPELLANT.

[Submitted April 1, 1895. Decided April 8, 1895.]

TOWNSITE ACT—*Title of lotowner.*—An original claimant of a lot in a townsite, entered according to the act of Congress of March 2, 1887 and the territorial laws of Montana in relation thereto, is not the owner in fee of the street or alley upon which his lot abuts, and has only an easement therein. (*Hershfield v. Rocky Mt. Bell Tel. Co.*, 12 Mont. 102, cited.)

ELECTRIC LIGHT COMPANY—*Erection of poles in street.*—A pole used for electric light purposes is within an urban servitude, where it appears that the pole in question is intended to serve public interests.

SAME—*Same—Injunction.*—The defendant, an electric light company, under contract with a city to light the streets and public buildings of the city, erected one of its poles about the middle of a sidewalk in an alley, the rear entrance to the plaintiff's saloon being about twenty feet distant from the pole. By an ordinance of the city council the defendant was required to erect new poles throughout the city, and only on one side of the street, and by reason of this requirement the use of the alley for the erection of poles was rendered necessary. It was shown that there was no serious inter-

ference with the air or light to the plaintiff's property, or access thereto, from the location of the pole complained of. *Held*, that there was no unreasonable use of the streets by the city, and no substantial interference with any of the rights of the plaintiff, against which a court of equity would interfere by injunction.

Appeal from Second Judicial District, Silver Bow County.

INJUNCTION. Judgment was rendered for the plaintiff below by SPEER, J. Reversed.

Statement of the case by the justice delivering the opinion.

Injunction. The plaintiff is the owner of lots 13 and 14, in block 38, in the city of Butte. These lots are occupied by a meat market and saloon. The property abuts upon Broadway and an alley running through said block. Plaintiff, in his complaint, says that he is the owner of a sidewalk in the rear of the brewery saloon in the alley; that the defendant, on May 26, 1893, without his consent, commenced to tear up the sidewalk at the corner of his said premises, and to dig thereat, and to erect a pole, and to place electric wires thereon, all of which would interfere with the travel upon said street, and retard the free use thereof and of the alley, and injure the premises, and endanger the property of plaintiff and the lives of the citizens. The defendant admits the ownership of the lots, but denies all the allegations of the complaint, and pleads that it conducts a general electric light business in Butte; that by an ordinance of the city it was required to erect new poles throughout the city, and only on one side of the street; that on East Broadway it could only erect poles on the north side, while the premises of plaintiff were on the south side; the defendant is under contract with the city of Butte to light the streets and public buildings of the city, and is the only contractor for such purpose; that to comply with the city ordinance and said contract the electric light wires had to be carried from the poles on the north side of Broadway through the alley in the rear of plaintiff's lots because defendant was not permitted to set poles on the south side of the street; that said alley had to be used to relieve the main street of too many wires; that

the city engineer gave the defendant permission to set three poles in said alley, and the pole in the rear of plaintiff's premises was one of the three; that said pole was not set on any premises belonging to plaintiff, but was set in the alley; and that it could not be in any other place without great inconvenience, damage and disregard to the public and private welfare.

There was a supplemental answer filed, in which the defendant set forth that since the institution of the suit the plaintiff petitioned the city council to have the pole objected to removed, and the city refused to grant the request. No replication was filed.

The cause was heard by the court. The evidence disclosed the following facts: The pole in question stands in the alley in the rear of the California Brewery, a half foot east of the line of the lots owned by plaintiff, and about an equal distance south of the line of Broadway. Its position was about in the middle of a sidewalk 3 feet wide, in the alley; the rear entrance to plaintiff's property being about 20 feet distant from the pole. The side entrances are 30 and 60 feet distant. The alley is 16 feet wide. Directly opposite the rear of the premises of plaintiff stands the city hall, a three story brick building, with an areaway from the basement thereof projecting into the alley. The areaway connected with the city hall prevented the pole from being placed on the opposite side of the alley from plaintiff's property. The city ordinances of Butte prevented the defendant from erecting poles on the south side of Broadway, because the telephone poles were on that side, and only one line of poles is permitted on each side of a street. The pole is necessary where it is in order to light the streets, and to relieve the main street of too many wires. The pole could not be placed further down in the alley, because wires from across the street would strike the city hall, and become dangerous, and because such a position would bring the poles closer together than 90 feet, which is prevented by ordinance. The defendant says that the pole would have been sunk six

feet in the ground but for the injunction, and, if it had been placed as contemplated, it would not have touched the plaintiff's building.

The court made the injunction permanent, and in the order used the following words: “* * * It appearing to the satisfaction of the said court that the said electric light pole referred to in said application is now situate and in process of erection and construction upon the premises of said plaintiff, and that, if the said pole be allowed to remain and be constructed and erected upon the said premises, it will endanger said premises and the passers-by,” etc., “therefore, it is hereby ordered, adjudged and decreed that you, the said defendants, are restrained and enjoined from erecting * * * any pole or poles for the purpose of carrying or containing any wires or electric wires * * * for any other purpose whatsoever, or in any manner interfering with or endangering or damaging or injuring said property or business of said plaintiff, or of passers-by, and from obstructing or interfering with the free passage of the general public in and to or upon or about the said premises and property described in the said complaint, and belonging to the said plaintiff, or the sidewalk or entrances thereupon or surrounding the same.”

Forbis & Forbis, for Appellant.

Electric light poles and wires are classed with gas pipes, and it seems to be clear that the rights of the abutting owner must be the same with respect to one or the other. (Keasbey on Electric Wires, § 1, page 86.) The use of the streets, under municipal sanction, for laying pipes for gas or erecting posts for carrying electric wires for supplying the city and its inhabitants with light is a legitimate use of the street for which the abutting owner is not entitled to compensation. (Keasbey on Electric Wires, § 1, page 86; § 2, page 87; § 18, page 83; Dillon on Municipal Corporations, 4th Ed., § 691, note; Lewis on Em. Dom., § 130.) Wherever there is a local government the local authorities have power to provide for light-

ing the streets, and either to lay down gas pipes or set up poles with electric wires for that purpose, without compensation to the abutting owner. (Keasbey on Electric Wires, § 4 and § 5, page 89; Lewis on Em. Dom., § 129; Dillon Mun. Corp. 691; *Johnson v. Thompson-Houston Co.*, 7 N. Y. Supp., 716; *Electric Const. Co. v. Hefferman*, 12 N. Y. Supp. 336.) When the highway is vested in the public, poles may be erected by grant of municipal authority, without regard to adjacent owners. (*Pacific Postal, etc., Co. v. Irvine*, 49 Fed. Rep., 113; Keasbey on Electric Wires, § 22, page 24; *McCormick v. District of Columbia*, 4 Mackey 396; 54 Am. Reps., 284; *Pierce v. Drew*, 136 Mass., 75, and courts of equity will not enjoin. (Keasbey on Electric Wires, page 70.)

HUNT, J.—By the admission of plaintiff, lots 13 and 14 were included in the townsite of Butte originally filed in the office of the county clerk and recorder of Deer Lodge county, Mont. It was also admitted that the townsite was entered for patent, and patented to the probate judge of Deer Lodge county, Mont., in 1877, under provision of the act of congress entitled “An act for the relief of the inhabitants of cities and towns upon the public lands,” approved March 2, 1867, and the acts of the legislative assembly of the territory of Montana, January 12, 1872, and July 22, 1879. It was further admitted that the townsite was surveyed, and that the alley in question in this action, and lying east of the lots upon which were situated plaintiff’s buildings, was embraced and included in the original plat of the townsite, and that the said alley has always been used as a public alley, and that the plaintiff derived title of the lots through the probate judge under the patent of said townsite, and according to the plat thereof. The fee in the alley was therefore originally in the United States. The United States granted it to the trustee of the townsite. The trustee was required by law to see that a survey of the plat was made and filed in the proper office, showing the blocks, lots, streets and alleys. The streets and alleys therefore became dedicated to the public use before the con-

veyance of the lots to plaintiff or his predecessors. (*Hershfield v. Rocky Mountain Bell Telephone Co.*, 12 Mont. 102.)

The plaintiff, therefore, is not the owner in fee of the alley in which the defendant erected its poles. Nor can he complain in this action, if the city of Butte had the power to permit the defendant to erect electric light poles wherewith to light the city, unless by erecting such poles an additional or unusual servitude was imposed upon the easement granted by the city. But we think that a pole used for electric light purposes is within an urban servitude where it appears that the pole in question is intended to serve public interests. (Rand. Em. Dom. § 401; Keasbey, Electric Wires, § 91; *McCormick v. District of Columbia*, 54 Am. Rep. 284.)

In considering the use of streets where electric railroad poles are erected,—and a use for electric light poles should be similarly regarded,—the courts sustain, generally, the principle recognized in *Hershfield v. Rocky Mountain Bell Telephone Co.*, *supra*, that “any use of a street which is limited to an exercise of the right of public passage, and which is confined to the mere use of the public easement, whether it be by old methods or new, and which does not tend in any substantial respect to destroy the street as a means of free passage, common to all the people, is perfectly legitimate.” By such uses the rights of the abutting owners are not invaded. It is simply a user of a right already vested in the public. (*Halsey v. Rapid Transit St. Ry. Co.*, 47 N. J. Eq. 380, 20 Atl. 859; *Gay v. Telegraph Co.*, 12 Mo. App. 485.)

We fail to see how a pole 12 or 15 inches in diameter, 20 feet distant from the doorway, can impede free ingress to the rear entrance of plaintiff's beer hall.

The power to light the streets of the city of Butte has been delegated to the municipality by the legislature. (Comp. St. Mont. page 674.) By ordinance of the city council the defendant was authorized to erect poles throughout the city, and on one side of the street only. Under the authority and permission of the city the defendant, therefore, properly erected,

or was about to erect, the particular pole complained of, in the alley in the rear of plaintiff's lots.

The testimony establishes the fact that there is no serious interference with the air or light to plaintiff's property, or access thereto. The use of the street for the contemplated purpose is in no wise repugnant to the general use to which streets of cities may be appropriately put in yielding to the necessities for the convenience and comfort of the inhabitants thereof. (*Tuttle v. Brush Electric Illuminating Co.*, 50 N. Y. Super. Ct. Rep. 464; *Hershfield v. Rocky Mountain Bell Telephone Co.*, *supra*.)

The pole was being erected at the most convenient and suitable place. It was necessary to the successful conduct of the defendant's business in lighting the streets of the city. Considering all these facts, the plaintiff cannot complain. (*Johnson v. Thompson-Houston Electric Co.* (Sup.) 7 N. Y. Supp. 716; *Keasbey, Electric Wires*, § 89; *Electric Construction Co. v. Heffernan* (Sup.) 12 N. Y. Supp. 336; *Lewis, Em. Dom.* § 130.)

From all the evidence, and the pleadings, and the principles of law applicable thereto, we are of opinion that there was no unreasonable use of the streets by the city, and no substantial interference with any of the rights of plaintiff. A court of equity will not, therefore, interfere.

The judgment of the district court is reversed, and the cause remanded, with direction to dissolve the injunction heretofore granted.

Reversed.

DE WITT, J., concurs.

ANACONDA MINING COMPANY, APPELLANT, v. SAILE,
RESPONDENT.

[Submitted April 3, 1895. Decided April 8, 1895.]

DEFAULT—Vacation of judgment by—Excusable negligence.—The defendant's attorney was informed by the clerk that no business would be transacted by the court until after a certain date, and, relying upon this statement, the attorney did not appear until such date, when he ascertained that his pending demurrer had been overruled, and a default entered. *Held*, that the court below did not err in holding that the negligence of the defendant was excusable, and the default was properly opened. (*City of Helena v. Brule*, 15 Mont. 429, distinguished.)

SAME—Condition of opening default—Statute of limitations.—In opening a default against the defendant upon the ground of his excusable negligence, a denial of the plaintiff's request to impose as a condition that the defendant should not be allowed to plead the statute of limitations is not error.

Appeal from Third Judicial District, Deer Lodge County.

EJECTMENT. Judgment against defendant by default was set aside by BRANTLEY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The defendant's demurrer to the plaintiff's complaint was submitted to the court, and overruled October 8, 1892. Defendant was granted ten days to answer. No answer was filed. Default was entered October 20th, and judgment was rendered for plaintiff, November 26th. Defendant moved to set aside the judgment and the default. The motion was granted. Plaintiff appeals. The motion was on the ground of mistake, surprise, and excusable neglect. An answer was also tendered with the motion. Defendant's attorney, F. Adkinson, upon the motion, filed his affidavit, by which it appeared that on September 30, 1892, attorney Adkinson went to the clerk's office in the town of Deer Lodge, where the court was held, at which time and place he ascertained that the demurrer was still pending, and the clerk informed him that no business would be transacted by the court until after the general election, which was to be held in November, and that he (the clerk) was then

preparing notices to send to jurors that their attendance would not be required until November 14th. Said attorney Adkinson, depending upon this information, did not then further appear in the case until after the default. In opposition to the motion, the clerk filed his affidavit, in which he admits that he stated to said Adkinson that there would be no business in said court until after November 14th. The clerk said that he did not state that there would be no motions or demurrers until after November 14th, and he did not intend or suppose that he was conveying the idea to Adkinson that no demurrers would be heard. With the motion defendant tendered an answer. The action was in the nature of ejectment. The answer denied the allegations of the complaint, and further pleaded the statute of limitations. The plaintiff requested that, if the default were opened, the court impose as a condition that the defendant be not allowed to plead the statute of limitations. The court refused to impose this condition, and opened the default generally, upon payment of the costs.

George B. Winston, M. Kirkpatrick and W. W. Dixon,
for Appellant.

The court erred in granting the motion and in not imposing as a condition of the granting of the motion that the defendant should not plead the statute of limitations. (*Hawes v. Hoyt*, 2 How. Pr. 454; *Sheets v. Baldwin*, 12 Ohio, 120; *Newsome's Administration*, 18 Ohio, 240; *Cook v. Spears*, 2 Cal. 409; 56 Am. Dec. 348; *Daly v. Russ*, 86 Cal. 114; *Haines v. Lytle*, 4 West. L. J., 1; *Pennington v. Gibson*, 6 Ark., 447; *Perkins v. Burbank*, 2 Mass., 81; *Fox v. Baker*, 2 Wend., 244; *Jackson v. Varick*, 2 Wend., 294; *Beach v. Fulton Bank*, 3 Wend., 573.) The affidavit of one of the attorneys for the defendant states that it was impossible to prepare the answer sooner than it was prepared, owing to the fact that the examination of certain records was necessary before answer could be made, but is no excuse for not answering. (*Bailey v. Taaffe*, 29 Cal., 423.) The defendant in his affi-

davit states that he is not familiar with our language, but admits that he knew that suit had been brought against him. This is not sufficient excuse for setting aside a default. (*Heisterhogen v. Gorlond*, 10 Mo. 66.) The defendant cannot plead that his attorney was neglectful and not he, for the neglect of his attorney is his own neglect. (Freeman on Judgments, 3d Ed. 112; *Spaulding v. Thompson*, 12 Ind. 477; 74 Am. Dec. 221; *Thielman v. Burg*, 73 Ill. 293; *Harper v. Mallory*, 4 Nev. 447; *Brumbaugh v. Stockman*, 83 Ind. 583; *Ordway v. Suchard*, 31 Iowa 481; *Welch v. Challen*, 31 Kan. 696; *Farrant Co. v. Lively*, 25 Tex. Supp. 399; *Foster v. Jones*, 1 McCord 116.)

F. Adkinson and Brazelton & Scharnikow, for Respondent.

Under the belief that the court has postponed all business until the 14th of November, the defendant's attorney did not further attend the court until after the default was entered. We insist that this was not negligence, but clearly a case where the attorney was misled. (Freeman on Judgments, 4th Ed. 113; *Cruse v. Cunningham*, 79 Ind. 402; *Sanders v. Hall*, 37 Kan. 271; *Simmons v. Church*, 3 Iowa 284; *Jean v. Hennessy*, 74 Iowa, 348; *Beunovista Co. v. Iowa Falls R. R. Co.*, 49 Iowa 657; *Branch v. Walker*, 92 N. C. 87; *Weil v. Woodward*, 101 N. C. 94; *Heardt v. McAllister*, 9 Mont. 405; *Jensen v. Barbour*, 12 Mont. 566.) No case can be found that goes to the extent that under no state of facts will a judgment be opened to allow the defense of the statute of limitations to be interposed, and the tendency of the later authorities is to place the statute upon the same footing as any other legal defense. (Freeman on Judgments 4th Ed. § 108; *Herman v. Rinker*, 106 Pa. St. 121; *Gossong v. Rossar*, 112 Pa. St. 197; *Ellinger's Appeal*, 114 Pa. St. 505; *Mitchell v. Campbell*, 14 Ore. 454; *Gourlay v. Hutton*, 10 Wend. 515.) In one case a default was set aside and the defendant was permitted to plead usury. (*Allen v. Mapes*, 20 Wend. 633.) The cases cited by the appellant are nearly all old and are not followed by the later de-

cisions. The case of *Fox v. Barker*, 2 Wend. 244, has been overruled in *Lovett v. Cowman*, 6 Hill 226; *Jackson v. Varick*, 2 Wend. 294, is not in point, and the same may be said of *Beach v. Fulton Bank*, 3 Wend. 573.

DE WITT, J.—We are of opinion that the district court did not err in holding that the negligence of defendant was excusable. The defendant alleges—and it is not denied—that the clerk told him on September 30th that there would be no business transacted by the court until November 14th. Hearing a demurrer was business of the court. The clerk modified his statement by saying, further, in his affidavit, that he did not intend to convey the idea that no demurrers would be heard. But the fact is that he said that no business would be done, and the idea certainly was conveyed to Mr. Adkinson that hearing demurrers was a part of the business which would not be transacted until after November 14th. Long prior to November 14th the demurrer was heard and overruled, and defendant's default entered. We think Adkinson was excusable in relying upon the information which the clerk gave him. The clerk was the ministerial officer of the court. We think that an attorney had perfect right to rely upon the statement of such a court officer that no business would be done until a certain time. It is not as if this information came from a sheriff, or a bailiff, or some attendant upon the court. The clerk had the records of the court, and knew its business. It is not, as suggested by appellant, as if the clerk had told an attorney that the court would take a certain action in a case, that he would overrule or sustain a demurrer, or do some other judicial act. Perhaps an attorney would not be excused in relying upon the statement of the clerk as to some judicial act which the court was to do, but he certainly was justified in relying upon the statement of the clerk simply that no business was to be transacted by the court. We do not think that an attorney could ordinarily be expected to go further, and inquire of the judge as to such a matter, which was surely reasonably within the knowledge of the clerk.

This case is readily distinguishable from *City of Helena v. Brule*, 15 Mont. 429. In that case the attorney had no apology whatever for his negligence. He simply stated that he was not advised as to the ruling upon his demurrer. It did not appear that it was any one's duty to advise him.

It has been suggested in this case that defendant's attorney was inexcusably negligent, in that on the 30th of September he did not withdraw his demurrer, and file an answer, for the reason that it appears there was no merit to his demurrer. It is probably true that the demurrer was not well taken, for, if it had been, defendant would doubtless have appealed from the judgment entered after overruling his demurrer. But we cannot say that it was negligence not to withdraw the demurrer, and file an answer, on September 30th. It certainly is a practice not to be commended to file frivolous demurrers, but no penalty heretofore has ever been imposed by statute or by practice upon such action. We cannot say that, in consideration of the law and practice in that respect, it was negligence not to withdraw an unmeritorious demurrer, as long as the party had the right under the law to file it, and have it remain on record until disposed of by an order of the court in the ordinary course of practice.

Again, it is urged that the court erred in opening the default without imposing the terms that the defendant should not be allowed to plead the statute of limitations. It is argued by appellant that, as the defendant is asking to be relieved from his own negligence, he should not be allowed to hold plaintiff to the results of its negligence by virtue of its not commencing its action within the period of the statute of limitations. But defendant's negligence, we have determined, was excusable, while as to whether the plaintiff's negligence in letting the statute of limitations run, was excusable, is not a question.

The statute of limitations is a defense to which all men are entitled as a right. The views of courts, since statutes of limitation were first considered, have changed. Originally, it

was regarded as a statute of repose, and not one of presumption. This view changed, and the statute was regarded as one of presumption, and not of repose. The views changed again, the modern doctrine is that it is a statute of repose. (3 Parsons on Contracts c. 8.) We quote from that chapter as follows: "And at length, through a series of decisions, going to show that the statute is intended for the relief and quiet of defendants, the law reached the conclusion justly and forcibly expressed by Mr. Justice Story in the case to which we have before referred. He says: 'I consider the statute of limitations a highly beneficial statute, and entitled, as such, to receive, if not a liberal, at least a reasonable construction, in furtherance of its manifest object. It is a statute of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses. The defense, therefore, which it puts forth, is an honorable defense, which does not seek to avoid the payment of just claims or demands, admitted now to be due, but which encounters, in the only practicable manner, such as are ancient and unacknowledged, and whatever may have been their original validity, such as are now beyond the power of the party to meet with all the proper vouchers and evidence to repel them. The natural presumption certainly is that claims which have been long neglected are unfounded, or, at least, are no longer subsisting demands. And this presumption the statute has erected into a positive bar. There is wisdom and policy in it, as it quickens the diligence of creditors, and guards innocent persons from being betrayed by their ignorance or their overconfidence in regard to transactions which have become dim by age. Yet I well remember the time when courts of law exercised what I cannot but deem a most unseemly anxiety to suppress the defense; and when, to the reproach of the law, almost every effort of ingenuity was ex-

hausted to catch up loose and inadvertent phrases from the careless lips of the supposed debtor, to construe them into admission of the debt. Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation.''' The respondent also cites the following cases, which are in point: Freeman on Judgments, 4th Ed. Sec. 108, citing *Ellinger's Appeal*, 114 Pa. St. 505, 7 Atl. Rep. 180; *Mitchell v. Campbell*, 14 Or. 454; 13 Pac. Rep. 180; *Herman v. Rinker*, 106 Pa. St. 121; *Sossong v. Rosar*, 112 Pa. St. 197; 3 Atl. Rep. 768; *Gourlay v. Hutton*, 10 Wend, 595.

We are therefore of opinion that the district court exercised a proper discretion in opening this default, and, it so being determined that the negligence of defendant was excusable, he had the right to interpose the defense of the statute of limitations, and the court did not err in refusing to impose the terms that he be not allowed to plead that defense. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

CABBAGE, RESPONDENT, v. SCHULTZ, APPELLANT.

[Submitted April 1, 1895. Decided April 8, 1895.]

APPEAL—*Review of findings of fact.*—Where the issues in an action are purely those of fact, upon which there is a conflict of evidence, a verdict in such action will not be disturbed on appeal.

Appeal from Second Judicial District, Silver Bow County.

ACTION on an account for work and labor. Judgment was rendered for the plaintiff below by MCHATTON, J. Affirmed.

F. T. McBride, for Respondent.

PEMBERTON, C. J.—This is an action on account for work and labor done and performed by plaintiff on the mining claim

of defendant, at her instance and request; for money expended at her request, and for her use and benefit, and for the amount of an account assigned to plaintiff, which it is alleged was due and owing from defendant to one James W. Cabbage.

The answer of defendant denies all the allegations in the complaint. The case was tried by a jury and a verdict rendered on the full amount of the account. Judgment was rendered in accordance with the verdict. The defendant filed her motion for a new trial, which was denied by the court. From the judgment, and the order denying a new trial, defendant appeals.

Counsel for the appellant contends that the evidence is insufficient to authorize the verdict or support the judgment. We cannot agree with this contention. There is an absolute conflict of evidence in the case, but it is amply sufficient to warrant the verdict. A simple conflict of evidence does not authorize this court to set aside the verdict and reverse the judgment. It was the province of the jury to settle this conflict. They are by law the judges of the credibility of the witnesses, and the weight to be given to their testimony. They tried the issues joined by the pleadings in the case. These issues were purely those of fact. These issues were fairly submitted to the jury by the instructions of the court. The court, who tried the case, heard the witnesses, saw and considered their manner and interest in the event of the suit, refused to set aside the verdict and grant a new trial.

From a full investigation of the record, we are of the opinion that there was no error in the action of the court.

The judgment is affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

KEEFE, RESPONDENT, v. DORELAND ET AL., APPELLANTS.

[Submitted March 1, 1895. Decided April 8, 1895.]

CONTRACTS—*Parol evidence to vary contract.*—In a bond for title to an undivided interest in a mining claim, a provision that one-sixth of the net proceeds of all shipments of ore should be paid by the vendees to the vendor, to be applied on the agreed purchase price for such undivided interest in the mining claim, is wholly free from ambiguity, and the agreement cannot be varied or added to by parole evidence that, according to a custom among miners, all the expenses of mining, as well as the expense of shipping the ore, should be deducted before payments to the vendor.

EJECTMENT—*Judgment in action of.*—In an action of ejectment to recover an undivided interest in a mining claim, a judgment in favor of the plaintiff should be for the possession of such undivided interest, and not for that of the whole mining claim. (*Hopkins v. Noyes*, 4 Mont. 550, cited.)

Appeal from Third Judicial District, Deer Lodge County.

EJECTMENT to recover possession of a mining claim. Judgment was rendered for the plaintiff below by DUFFEE, J. Affirmed and modified.

Statement of the case by the justice delivering the opinion.

This is an action of ejectment brought to recover possession of the George mining claim, in Deer Lodge county, and for damages for rents and the wrongful withholding of the possession thereof.

The answer denies the allegations of the complaint, except that it admits the plaintiff to be the owner of the undivided one-third of the mining claim in controversy, as a tenant in common therein with one G. W. Brownell and one Charles Jaeckel. In the answer it is alleged, as an affirmative defense, that on the thirteenth day of October, 1890, plaintiff executed and delivered to defendants G. W., E. A. and J. F. Doreland, and W. M. Foley, his agreement in writing for the sale to them of his undivided interest in the said mining claim, under which agreement said defendants were to enter upon and occupy said mining claim until the thirteenth day of October, 1892, upon which last date they were to become the owners of plain-

tiff's said interest therein, provided they complied with the conditions of purchase therein named; that said defendants entered upon said mining claim under and in pursuance of the terms of said agreement; that on the thirteenth day of April, 1891, defendants J. F. Doreland and Foley sold and assigned their interest in said agreement to defendant D. C. Fisher; that on the fourth day of August, 1891, defendant G. W. Doreland assigned his interest in said agreement to defendant J. C. English; and that since these transfers defendants English and Fisher have been in possession of said interest in said mining claim. And it is further alleged in said answer that on the thirteenth day of October, 1890, defendant G. W. Doreland entered into a like agreement with Charles Jaeckel, one of the co-owners of plaintiff in said mining claim, for the purchase of his undivided one-third interest therein; that said Doreland took possession of the one-third interest of said Jaeckel in said mining claim, under said agreement with him; that on the twenty-second day of September, 1891, said Doreland assigned an interest in his said agreement with Jaeckel to defendant J. C. English, and since said date said defendants Doreland and English have been in possession of the interest of said Jaeckel in said mining claim, under said agreement with him. A copy of the agreement entered into between plaintiff and Doreland and others is attached to the answer, as a part thereof. This agreement is a bond for title to the undivided one-third interest of the plaintiff in and to said George mining claim, upon condition that the obligees pay to plaintiff \$20,000 on or before the thirteenth day of October, 1892. It also authorizes the obligees to enter upon and take possession of plaintiff's one-third interest in said mining claim and hold and mine the same until the thirteenth day of October, 1892, upon certain conditions, among which it is only necessary to mention the following: "All shipments of ore from said mine shall be made in the names of the parties hereto, and all remittances for such ore, made by the person, persons, or company to whom such shipments are made, shall be made to the

First National Bank of Anaconda, Montana, to be placed to the credit of the parties hereto, and one-sixth of the net proceeds of all such shipments of ore to be paid by said bank on demand to the said first party, and to be applied by said first party upon the price \$20,000, agreed by said second parties to be paid for said mine as aforesaid, in the event of the purchase of the same by said second parties; and, should said second parties fail to pay said sum of \$20,000 at the time and in the manner aforesaid, then such one-sixth interest of the net proceeds of such shipments to remain the property of the said first party, as consideration of the bond and lease. Should said second party make failure or default in any of the covenants contained herein, then said first party may, at his option, demand possession of said premises, and may enter thereon and remove said second parties, or any person or persons under them, from such premises, without suit or process of law, and resume possession thereof."

In his replication, plaintiff alleges that the defendants wholly failed to comply with the above conditions of said agreement; that they have taken out ore of great value from said mine, and have failed to pay to him the one-sixth of the net proceeds of each shipment thereof; that they have converted the amount due plaintiff to their own use; that they refuse to pay the same; that by reason thereof the right of defendants to the possession of said mining claim has become forfeited; that plaintiff has demanded that the possession of said mining claim be delivered to him by said defendants; and that said defendants have refused to deliver the possession thereof to plaintiff.

The case was tried with a jury. The verdict was for the plaintiff, for possession of the premises and nine hundred dollars damages. The judgment of the court is in accordance with the verdict. From this judgment, and an order denying a new trial, this appeal is prosecuted.

Brazelton & Scharnikow, for Appellants.

F. W. Cole, for Respondent.

PEMBERTON, C. J.—At the trial of the case the defendants offered evidence to prove what construction should be given to the words, “one-sixth of the net proceeds of all shipments of ore,” as used in the contract between plaintiff and themselves, as quoted above. The defendants contended that under said contract they were entitled to deduct all the expenses of mining, as well as the expenses of shipping, the ore, before plaintiff was entitled to receive his one-sixth of the net proceeds thereof, and sought to prove by witnesses that, according to the custom of miners, said contract should be so construed. This evidence was rejected; the court holding that the defendants could only deduct the expenses of shipping the ore, and not the expenses of mining it, and so instructed the jury. This action of the court is assigned as error. We think there was no error in this action of the court. The contract is not ambiguous. It specifies what expenses the defendants could deduct from the value of the ore, and confines these expenses to the shipping of the ore. There is a vast difference between the expenses of mining and shipping ore and the expense of merely shipping the same. The words used are perfectly plain, and we think it would have been improper to have allowed evidence to prove that they meant something else. Parol evidence was not admissible either to change the contract, or add something to it. This is elementary law.

It also appears from the record that the original parties to the contract put the same construction upon it that the court did, for, until the original obligees assigned their interest in the contract, they only deducted the expenses of shipping the ore, in their settlements with the plaintiff. We think the contract is perfectly plain in its terms. There is no ambiguity about it. The expenses of shipping the ore are the only expenses mentioned therein that defendants were authorized to deduct from the value thereof before paying to plaintiff his one-sixth of the net proceeds. To charge plaintiff with any part of the mining expenses would be adding something to the

contract that is not in it, and which, seemingly, was not intended to be in it by the original parties.

There are several specifications of error, attacking the action of the court in excluding testimony and giving instructions involving the construction of this agreement, but we have deemed it sufficient to treat them all as one assignment.

The defendants complain of the judgment of the court, in that it is for the possession of the whole George mining claim. The plaintiff, under his agreement with the defendants, leased or let to them his undivided one-third interest in said mining claim, and no more. This undivided one-third interest in said mining claim is the only part or interest therein that defendants bound themselves, under said agreement, to redeliver the possession of to plaintiff, in the event of their default in complying with the terms of said agreement. The possession of this undivided one-third interest was the only part or interest in said mining claim that plaintiff had the right to demand in case of the default of the defendants. If the co-owners of plaintiff, or their assigns, were in possession of their undivided two-thirds interest in said mining claim, it would be impossible for defendants to comply with the judgment. The judgment should have been in favor of plaintiff, and against the defendants, for possession of that interest in the George mining claim which they, or either of them, acquired under said contract or lease, and that he be put into possession of said interest, and the judgment should be modified in this respect. (Freeman, Cotenancy § 293; *Newman v. Bank of California*, 80 Cal. 368, 22 Pac. 261; *Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280.)

There are other errors assigned, but we think it unnecessary to treat them.

The case is remanded, with directions to the court to modify the judgment in accordance with this opinion; and the judgment, as so modified, is affirmed.

Modified and affirmed.

DE WITT and HUNT, JJ., concur.

NELSON, APPELLANT, v. CITY OF HELENA, RESPOND-
ENT.

[Submitted April 4, 1895. Decided April 8, 1895.]

CONTRIBUTORY NEGLIGENCE—Burden of Proof.—In actions for damages for personal injuries, contributory negligence is a matter of defense, and the absence of contributory negligence is not required to be proved by the plaintiff as part of his case. (*Higley v. Glimmer*, 3 Mont. 97, cited.)

SAME—Same.—A corollary to the rule that the plaintiff in an action for personal injuries need not prove the absence of contributory negligence is to the effect that, whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him. (*Kennon v. Glimmer*, 4 Mont. 433; *Wall v. Helena Street Ry. Co.*, 12 Mont. 44, cited.)

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for damages for personal injuries. Defendant had judgment below. Plaintiff's motion for a new trial was denied by BUCK, J. Reversed.

Statement of the case by the justice delivering the opinion.

This is an action brought by the plaintiff to recover damages for personal injuries sustained by reason of his falling upon one of the sidewalks of defendant, it being alleged that the injury occurred by reason of the defendant's negligence in allowing ice to accumulate upon said sidewalk. Upon a trial to a jury a verdict was rendered, and judgment entered in favor of defendant. The plaintiff appeals from the judgment, and from an order denying a new trial.

Among other instructions, the court gave the following: "The injury sustained by plaintiff is admitted, but before he can recover he must prove that it resulted from negligence on the part of defendant, and without negligence on his own part directly and immediately contributing to the accident." The giving of this instruction is assigned as error.

T. E. Crutcher, for Appellant.

16	21
17	388

16	21
19	100

16	21
132	534

16	21
26	136
26	138
26	442

16	21
30	57

16	21
29	167
29	230

16	21
35	229

16	21
37	172
38	382

There is no evidence showing or tending to show contributory negligence. That it is not contributory negligence for a person with a constitutional disease to venture on the streets is too well settled to admit of argument. (2 Dillon on Municipal Corporations, § 1007, page 1262; Jones on Negligence of Municipal Corporations, § 90, page 176.) The fact that the plaintiff knew of the condition of the sidewalk will not bar his right to recover. (*Smith v. Butler*, 48 Mo. App. 663; *Flora v. Nancy*, 26 N. E. Rep. 645.) A traveler who knows a sidewalk is out of repair is not required to take some other route, but must use ordinary care in walking over it. (*Sandwich v. Dolan*, 34 Ill. App. 199; *Clayton v. Brooks*, 31 Ill. App. 62; *Harvard v. Senger*, 34 Ill. App. 223.) The fourth instruction (given in statement of facts) is erroneous in that it does not state the law correctly and is misleading in that there was no evidence tending to prove that there were any other sidewalks equally as direct or safer. A traveler who knows a sidewalk is out of repair is not required to take some other route. (*Sandwich v. Dolan*, Supra; *Clayton v. Brooks*, Supra; *Harvard v. Senger*, Supra; *Flora v. Nancy*, Supra; *Argus v. Sturgis*, 48 N. W. Rep. 1085; *Pomfrey v. Saratoga*, 104 N. Y. 459.) There being no evidence whatever of contributory negligence it was error to give the instruction.

Stephen Carpenter, City Attorney, for Respondent.

DE WITT, J.—It is the law of this jurisdiction that, in actions for damages for personal injuries, contributory negligence is a matter of defense, and that the absence of contributory negligence is not required to be proved by plaintiff, as part of his case. There is some diversity among courts of last resort as to whether contributory negligence is a matter of defense, or whether plaintiff should allege and prove himself to be free from such contributory negligence. But that question has been long at rest in this court. It is the doctrine of this jurisdiction that contributory negligence is a matter of defense, and that plaintiff need not allege or prove its absence. (*Hig-*

ley v. Gilmer, 3 Mont. 97; 35 Am. Rep. 450.) Our examination of the decisions and the text writers leads us to the opinion, with deference to the distinguished courts that have held the contrary doctrine, that this court, in this respect, is with the majority of opinion and adjudication. Mr. Beach, in his work on Contributory Negligence, § 157, says that it is a rule that contributory negligence is a matter of defense in the states of Alabama, California, Georgia, Kentucky, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, West Virginia, Vermont and Colorado, and in England and the United States supreme court. To this list, Shearman and Redfield add Arizona, Oregon and Dakota. As above noticed, Montana belongs in the same category. (See, also, the collection of cases holding the two different rules, as found in 2 Thompson on Trials, § 1679.) That author names the following courts as opposed to the rule which has been adopted in Montana: Massachusetts, Maine, Iowa, Mississippi, Michigan and Indiana. There is a corollary, rather than an exception, to this rule (*Kenyon v. Gilmer*, 4 Mont. 433, 2 Pac. 21), as the writer of this opinion noted in some remarks made in the case of *Wall v. Helena St. Ry. Co.*, 12 Mont. 56, 29 Pac. 721; the corollary being to the effect that whenever the plaintiff's own case raises a presumption of contributory negligence the burden of proof is immediately upon him. In such a case it devolves upon the plaintiff, as of course, to clear himself of the suspicion of negligence that he has himself created. He must make out his case in full, and where the circumstances attending the injury were such as to raise a presumption against him, in respect to the exercise of due care, the law requires him to establish affirmatively his freedom from contributory fault. (Beach on Contributory Negligence, § 157.) But the corollary is not of application in the case at bar.

In this case the jury found for the defendant, but we do not know whether their verdict proceeded upon the ground that

they believed from the evidence that the defendant was not guilty of negligence, or that they believed from the evidence that the plaintiff had not proved himself free from contributory negligence.

The court, by its instruction, told the jury that, in order to find for the plaintiff, he must prove that he himself was free from contributory negligence. For all we know now, the jury may have found that the plaintiff had not proven himself free from contributory negligence. The action of the court in this instruction cast upon the plaintiff a burden of proof which he is not required, in this jurisdiction, to assume.

There are some other assignments of error made by the appellant, none of which, however, we think, are well taken. Otherwise than as to the instruction which we have held to be bad we are of opinion that the case was properly tried and submitted to the jury.

For this error the judgment is reversed, and the case is remanded for a new trial.

Reversed.

PEMBERTON, C. J. and HUNT, J., concur.

16	24
81	106

SHEPHERD, RESPONDENT, v. FIRST NATIONAL BANK,
OF BUTTE, APPELLANT.

[Submitted March 20, 1895. Decided April 15, 1895.]

HUSBAND AND WIFE—*Transactions between, how regarded.*—Money transactions between husband and wife, when creditors of the husband are concerned, should be carefully scrutinized, lest the intimate relations of such persons should be the convenient means of working fraud against creditors. But it is not fraud *per se* for a husband to pay his wife a debt which he honestly owes her. (*Lambrecht v. Patten*, 15 Mont. 260, cited.)

SAME—*Fraudulent conveyance*—*Transfer of property by husband in payment of debt to wife.*—Where a husband, being insolvent, and owing both his wife and a bank, paid the debt to his wife in full by deeding to her property of less value than the amount of the debt, which property he obtained by money drawn from the bank, and the bank took no steps to subject the property to its claim until fourteen months after the deed was made, and until a considerable time after full knowledge of all the circumstances, but permitted the husband's overdraft to continue at the bank, and to increase at one

time in the course of business to two thousand dollars in excess of what it was when the first payment was made on the property, this is evidence clearly tending to show that the bank did not regard the transaction as fraudulent during that period, and the transfer of the property to the wife, in such case, was not fraudulent *per se*.

FINDINGS OF JURY—*Vacating and setting aside*.—The exercise of the court's discretion in setting aside the findings of the jury, when they are absolutely and clearly against the evidence, will not be disturbed on appeal.

Appeal from Second Judicial District, Silver Bow County.

ACTION to remove cloud upon title. Judgment was rendered for the plaintiff below by McHARTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action in the nature of one to remove a cloud from the title of plaintiff to certain real estate. On December 9, 1891, the defendant, the bank, commenced an action in the district court against Frederick H. Shepherd, the husband of this plaintiff, praying judgment for the sum of \$10,000 and interest. The bank, as plaintiff in that suit, procured the issuance of a writ of attachment. Said writ was levied in the manner provided by law upon the interest of defendant therein, Frederick H. Shepherd, in and to the property known as "lot 6, block 32, in the city of Butte." The legal title of said property was in the name of this plaintiff, Flora E. Shepherd. The deed was made to her.

The bank, by its attachment, took the position that, while the legal title was in Mrs. Shepherd, in fact the defendant Frederick H. Shepherd was the real and equitable owner of said premises. On the 10th of October, 1890, Patrick Talent owned said premises, and deeded the same to Flora E. Shepherd, under the circumstances as will appear below. The bank, in its action against Frederick H. Shepherd, obtained judgment against him on the 8th of February, 1892, for \$10,508.33. The plaintiff in this action claims that Frederick H. Shepherd never had any interest whatever in said real property, and that the filing of the writ of attachment is a cloud upon her title, which injures the saleable quality of the same. She asks that the levy of said writ, as against the said real estate, be declared void.

In an answer filed by defendant, the bank, it set up that said Frederick H. Shepherd was indeed the equitable owner of the property described. It was upon this issue that the case was tried.

It appears that Frederick H. Shepherd, about October, 1890, was engaged in the business of buying ores in Butte. He had an overdraft account at the First National Bank. He was buying, selling and shipping ores and drawing money from the bank to pay for ore, and depositing funds therein again as he received returns from his ore sales. On October 10, 1892, his overdraft account was in the neighborhood of \$7,000. He claimed that he then had \$11,000 worth of ore on his platform. He consulted the cashier of the bank about buying a home. Finally, on October 10, 1892, he bought the house and lot now in controversy. The price was \$6,500. He further overdrew his account at the bank in the sum of \$4,000, and made a first payment for the premises. The remainder of the consideration was left for deferred payments. Mr. and Mrs. Shepherd both testified that he owed her, on October 10th, about \$8,000, without interest. When the purchase of the house and lot was made, the deed from the grantor was made to Mrs. Shepherd. Both the Shepherds testified that this house and lot was a full payment by Shepherd to his wife of the amount which he owed her, up to the time when the title of this house and lot was made to her.

Upon the trial special findings were submitted to the jury, which they answered as follows: "(1) Was Frederick H. Shepherd solvent on the tenth day of October, A. D. 1890? Answer. No. (2) Was Frederick H. Shepherd indebted to Flora E. Shepherd on the 10th day of October, A. D. 1890? Answer. Yes. (3) Did Frederick H. Shepherd and Flora E. Shepherd honestly and fairly agree between themselves that if Frederick H. Shepherd should pay Patrick Talent \$6,500 for the property in question that the debt from Frederick H. Shepherd to Flora E. Shepherd should be paid thereby? Answer. No. (4) Has Frederick H. Shepherd any interest in the prop-

erty in question? Answer. Yes. (5) Was the agreement that Frederick H. Shepherd should pay for the property transferred from Patrick Talent to Flora E. Shepherd made for a valuable consideration? Answer. No. (6) Was the deed from Patrick Talent to Flora E. Shepherd taken in the name of Flora E. Shepherd with the intent on the part of Frederick H. Shepherd and Flora E. Shepherd to defraud, hinder, or delay the creditors of Frederick H. Shepherd? Answer. Yes."

The plaintiff moved to set aside these findings, and to substitute others, and for judgment in her favor. The defendant moved the court to adopt the findings. After consideration for more than a month, the court decided these motions by making the following order:

"The motions of the respective parties to the above-entitled action for judgment having been heretofore argued and submitted, the court this day sustains the motion of plaintiff in so far as to make the following findings:

(1) The court finds, as found by the jury, that Frederick H. Shepherd was insolvent on the 10th day of October, 1890, and said finding is adopted.

(2) The court finds that Frederick H. Shepherd was indebted to Flora E. Shepherd on the 10th day of October, 1890, as found by the jury and said finding is adopted; and the court further finds that said indebtedness exceeded in amount the price paid for the property in question.

(3) The court declines to adopt any of the other findings of the jury.

(4) The court finds that Frederick H. Shepherd and Flora E. Shepherd fairly and honestly agreed between themselves that if the said Frederick H. Shepherd should pay Patrick Talent \$6,500 for the property in question, that the debt from said Frederick H. Shepherd to Flora E. Shepherd should be paid thereby.

(5) That Frederick H. Shepherd has no interest in the property in question.

(6) That the deed from Patrick Talent to Flora E. Shepherd was for a valuable consideration, as between said Flora E. Shepherd and Frederick H. Shepherd, and was not taken in her name with the intent on the part of Frederick H. Shepherd and Flora E. Shepherd to defraud the creditors of said Frederick H. Shepherd.

As conclusions of law the court finds:

(1) That all the findings of the jury not herein found and adopted should be set aside, and they are therefore vacated and set aside.

(2) That the plaintiff is entitled to judgment as prayed for in her complaint.

Judgment is hereby ordered accordingly. Dated December 3, 1892. John J. McHatton, Judge."

In pursuance of the findings made by the court, the judgment was entered in favor of the plaintiff. The defendant now appeals.

Forbis & Forbis, for Appellant.

Corbett & Wellcome, for Respondent.

DE WITT, J.—We are as fully aware now, as we were when we wrote the opinion in *Lambrecht v. Patten*, 15 Mont. 260, that money transactions between husband and wife, when creditors of the husband are concerned, should be scrutinized very carefully, lest the intimate relations of such persons should be the convenient means of working a fraud against creditors. The case before us seems to be, perhaps, somewhat a close one, and has received the careful consideration of this court, as well as that of the court below. The jury found (and the court adopted the findings in this respect) two facts which are not now questioned: (1) That on October 10, 1890, when Frederick H. Shepherd bought the real estate in question, and had it deeded to his wife, he was insolvent. (2) At that same time Frederick H. Shepherd was honestly indebted to his wife. The court added to this finding that the debt from Frederick

H. Shepherd to his wife was in a larger sum than the price paid for the real estate. This finding is amply sustained by the testimony. The Shepherds' testimony as to this was very much in detail as to the items and dates and memoranda and vouchers. We are clearly of opinion that this finding cannot be now disturbed.

We next examine the third finding of the jury in connection with the fourth finding of the court. The court's finding set aside that of the jury on this subject. The action of the court in this respect cannot be questioned. Both the Shepherds testified positively that the purchase by Frederick H. Shepherd of the real estate from Talent for \$6,500, and the deed of the same to Flora E. Shepherd, was in full payment of the debt owing from the husband to the wife. There was not a syllable of testimony to the contrary. The jury arbitrarily disbelieved the Shepherds. The court, on the other hand, believed them. There is nothing whatever in the case by which we can set aside the finding of the court in this respect. Thus we have the third fact in the case.

We now come to the fifth finding of the jury and the first paragraph of the sixth finding by the court. That the court was right in this follows from the view we have just expressed as to the third fact established. Thus we have the fourth fact in the case, namely, that the purchase of the real estate by Frederick H. Shepherd for Flora E. Shepherd was for a valuable consideration.

We next observe the sixth finding by the jury and the latter part of the sixth finding by the court,—that is, the court found, contrary to the finding of the jury, as follows: That the deed from Talent to Mrs. Shepherd was not taken in her name with the intent on the part of Frederick H. Shepherd and Flora E. Shepherd to defraud the creditors of Frederick H. Shepherd.

To recapitulate up to this point, we may state the situation as follows: Frederick H. Shepherd, being insolvent, and owing both the bank and his wife, paid his debt to his wife in

full by delivering to her property of less value than the amount of said debt, which property he obtained by money drawn from the bank. Under these established facts, and in consideration of the further facts in the case, which we will note below, must the district court be reversed in finding that the deed from Talent to Flora E. Shepherd was not taken in her name with the intent by the Shepherds to defraud the bank?

Mr. Shepherd consulted with the bank's cashier as to purchasing the real estate in question, which was a residence and a home. He did not tell the cashier that the deed was to be made to his wife. He owed the bank \$7,000 when he bought the house. He had \$11,000 worth of ore on his platform. The payment on account of the house of \$4,000 ran his overdraft to \$11,000. We speak in round numbers in giving these figures. The bank advanced the \$4,000 which was paid on the house. The bank people afterwards ascertained that the deed of the house was made to Mrs. Shepherd. It does not appear just when the bank cashier ascertained this fact. He himself, as a witness, did not state. The deed to Mrs. Shepherd was dated October 10, 1890. The bank commenced its action against Shepherd December 9, 1891. Fourteen months elapsed between these dates. Some time during this period of 14 months the bank's cashier ascertained that the deed had been made to Mrs. Shepherd. When he became aware of this fact he did not vigorously, or at all, protest to Mr. Shepherd as to his conduct. He simply spoke to Mr. Shepherd about it, and asked why he had the deed made to his wife. He did not then sue Shepherd. He did not demand or ask from Shepherd that he procure for the bank security upon the real estate for the overdraft. He took no step to subject the real estate to the bank's claim until 14 months after the deed was made, and until at least a considerable time after he knew that the deed was made to the wife. He allowed Shepherd's overdraft to continue at the bank, and to rise and fall in the course of business, and to increase at one time to the sum of \$13,000, which was \$2,000 more than it was after Shepherd had made his first

payment on the house. While these facts may not have satisfied the district court that the deed of the house was made to Mrs. Shepherd with the bank's consent, yet they did tend to show to that court that the officers of the bank did not look upon the transaction as a fraud upon the bank. If the bank had at once, upon the discovery that the deed was made to Mrs. Shepherd, closed Mr. Shepherd's overdraft account, instead of allowing it to increase, and had sued him, and sought to subject the real estate to the payment of their claim, the district court would have had a different showing of a claim by the bank of a fraud by the Shepherds. Under these circumstances, the district court had evidence which tended to show that the bank did not regard the Shepherd transaction as fraudulent until Shepherd had closed his business in Butte by a sudden departure therefrom.

We will now examine for a moment Mrs. Shepherd's relation to the transaction. She testified that Shepherd always promised to pay his debts to her when he could, or when he had something "to the good," as they both expressed it. Now, what was the situation, from Mrs. Shepherd's point of view, on October 10, 1890? On that date Shepherd owed the bank \$7,000, and had \$11,000 worth of ore. Mrs. Shepherd testified that she considered him \$4,000 "to the good" at that time; and it is to be observed that \$4,000 is the amount which Shepherd then put into the payment on the house. We cannot say that the district court erred in holding, under these facts, that there was not a fraudulent design between Mr. and Mrs. Shepherd. All the witnesses to the whole business were before the district court,—both of the Shepherds and the cashier of the bank, who attended to all of the business of the bank,—and also the memoranda and vouchers which Mrs. Shepherd produced.

Frederick Shepherd's situation on October 10, 1890, was this: He was insolvent, as found by the court; he was overdrawn at the bank \$7,000, and owed his wife \$8,000, without counting interest; he had \$11,000 in ore as assets. Under

these circumstances he paid one creditor rather than another. This one may do. Of these two creditors, his wife was pressing for a settlement, and the other creditor, the bank, was not so pressing, but, on the contrary, was extending his credit, and did later extend it \$2,000 more than the aggregate sum of \$7,000 and \$4,000. The creditor, the wife, agreed, in consideration of the delivery to her of the \$6,500 piece of property, to cancel a debt which amounted to \$8,000, without counting a large amount of interest. That was an advantageous settlement for Frederick Shepherd. That creditor—the wife,—was demanding a settlement, and was offering this large discount. The other creditor, the bank, was not demanding a settlement. Shepherd paid the importunate creditor, and did not pay the lenient one. If the creditor the wife had been any other than a wife, we think that the transaction would never have been questioned by any one.

We said in *Lambrecht v. Patten*, 15 Mont. 260: “It is not fraud *per se* for a husband to pay his wife a debt which he honestly owes her.” In the case at bar the district court was evidently of opinion that it must construe the payment to the wife as fraud *per se*, or not fraud at all. It certainly was not fraud *per se*. We can concede that the facts in this case, at first sight, demanded a close scrutiny from the district court. We think they were given a very close scrutiny. The court held the case five weeks after the trial before it made its findings. The court had had the witnesses before it, and the memoranda and vouchers and papers which had been produced. We cannot say that the district court did not wisely exercise its discretion, in view of all the facts. On general principles it is not as strong a case for affirmance when the jury finds one way and the court sets aside the findings and reaches an opposite conclusion, as it would be if the jury had found for the plaintiff, and the court had adopted that finding, or if the court had made the findings without a jury. But in this case, as we have observed above, some of the findings of the jury which the court set aside were absolutely and clearly against the evi-

dence; and, taking the findings which the court finally adopted, we are of opinion that the evidence to sustain them is sufficient to prevent this court from disturbing the discretion exercised below.

The judgment is therefore affirmed.

Affirmed.

HUNT, J., concurs.

STATE, RESPONDENT, v. McCAFFERY, APPELLANT.

[Submitted March 25, 1895. Decided April 15, 1895.]

16	33
23	598
16	33
24	85
16	33
25	16

CRIMINAL LAW—Assault with Deadly weapon—Sufficiency of indictment.—An indictment for an assault with a deadly weapon to do a bodily injury, under section 60, page 511, of the Compiled Statutes, is not rendered insufficient because of the omission therein of the technical word "feloniously," in the averment of the assault itself, where the intent with which the assault was made is specifically alleged to have been feloniously to inflict the injury.

SAME—Waiver of objections to complaint and information.—A defendant waives any rights he may have to object, either to the original verification of the complaint before the committing magistrate, or to the verification of the information in the district court, by pleading to the merits in such court.

SAME—Motion to quash information.—When an information has been filed without leave of court and before the examination and commitment of the defendant, an appropriate remedy is by motion to quash, under section 206 of the Criminal Practice Act, upon the ground that the information was not presented as prescribed by law.

SAME—Loss of right to move to quash.—Under section 206 of the Criminal Practice Act, if a defendant, on a second trial, does not ask to withdraw the plea of not guilty, interposed at the first trial, and have another and different plea substituted, it is a waiver of any grounds of objection to the information which might have been properly raised by motion to quash.

SAME—Former jeopardy—Inadmissible evidence.—On a trial for assault with a deadly weapon, the jury did not deliver or return any verdict into court, as required by section 334 of the Criminal Practice Act. At a second trial the defendant interposed a plea of former jeopardy, and offered to show that on the former trial the jurors agreed to acquit him of the charge, as set forth in full in the information, and find him guilty of simple assault only, and that their disagreement was as to the amount of the fine which should be by them imposed. *Held*, that this offer of the defendant was properly excluded by the court. (*In re Thompson*, 9 Mont. 381, cited.)

SAME—Review of action of court in discharging jury.—The exercise of the power of the court to discharge the jury when unable to agree on a verdict, as authorized by section 381 of the Criminal Practice Act, cannot be the subject of review, where the record is silent as to the length of time the jury deliberated.

SAME—Complaint on information and belief.—It seems that the proper construction of the words "probable cause," as used in the state constitution (art. 3, § 7), may be facts embodied in a complaint which charges the offense upon information and belief.

Appeal from Fifth Judicial District, Jefferson County.

CONVICTION for an assault. The defendant was tried before SHOWERS, J. Affirmed.

Statement of the case by justice delivering the opinion.

The defendant appeals from a judgment of the district court entered October 16, 1893, adjudging him guilty of the crime of assault, and sentencing him to pay a fine of five dollars and costs.

The bill of exceptions contains the original complaint made by the sheriff of Jefferson county, on information and belief, charging the defendant with having made an assault upon one John F. Smith, with the intent, then and there, feloniously to inflict upon the person of the said John F. Smith a bodily injury, no considerable provocation then and there appearing for said assault.

It appearing to the justice of the peace, "from the evidence, that there was probable cause for believing the defendant guilty," the defendant was held to answer for the offense set forth in the complaint.

On November 16, 1892, the county attorney filed an information against the defendant, the charging part of which is as follows: "With a certain deadly weapon, a dirk knife, then and there had and held in his hand, did make an assault in and upon one John F. Smith, then and there, being with the intent, then and there, feloniously to inflict upon the person of said John F. Smith a bodily injury, no considerable provocation then and there appearing for said assault."

T. J. Walsh and C. B. Nolan, for Appellant.

Henri J. Haskell, Attorney General, and *Ella L. Knowles*, for the State, Respondent.

HUNT, J.—The appellant contends that the information charged a simple assault, and not an assault with a deadly weapon to do a bodily injury, as defined by section 60 of the

Criminal Laws of Montana. The ground of his objection is based upon the omission in the information of the technical word "feloniously," in the averment of the assault itself. For the purpose of considering this point, we may grant that the offense charged is a felony, and that the word "feloniously" is indispensable to the validity of the information; yet, when the whole charge is carefully considered, we find that the intent with which the assault was made is specifically alleged to have been, "then and there, feloniously to inflict upon the person of the said John F. Smith a bodily injury," etc. We are of opinion that an assault with a dirk knife, with an intent at the time thereof to "feloniously" injure another, is, by all reasonable rules of construction, nothing but a felonious assault, and that the information is good, as against the objection interposed.

The essence of the crime charged is the intent with which the assault is made. Where, therefore, the intent, at the time of the assault, is alleged to have been feloniously to inflict the bodily harm, it follows that the expression of such intent, which was the attempt to do the injury, must have been with that wickedness of heart and mind contemplated by the law pertaining generally to felonies. So that, when the information averred and imputed to the defendant a felonious intent to do the bodily harm which he sought to inflict when he made the assault, it necessarily imputed a felonious intent in the assault itself then and there made, and the rules of criminal pleading are complied with by the alleged felonious character of the whole offense charged in the information.

After the information was filed, a trial was regularly had. The jury disagreed, and were discharged. Upon a second trial the defendant moved to strike the information from the files, for the reason that no leave of court was ever obtained to file the same, nor had the defendant ever been examined or committed by any magistrate for the commission of any crime. The motion was overruled. Thereupon the trial proceeded.

After the state had introduced at least one witness, defend-

ant objected to the introduction of any evidence because the information "was verified by the county attorney only on information and belief, though no leave of court was ever had, nor was there ever any examination or commitment by any magistrate." The objection was overruled.

The point made by defendant is that, because the sheriff verified the original complaint before the justice on information and belief, the whole proceeding before the magistrate was a nullity, and that, therefore, there was no examination and commitment as required by section 8, Art. 3, of the constitution of the state.

It is unnecessary to decide, in this case, whether a verification of a complaint before a magistrate, by an officer, on information and belief, is good or bad, because the question was not raised before the magistrate, or before plea by the defendant in the district court. And by failure to raise the point before plea to the merits the defendant waived any rights he may have had to object either to the original verification of the complaint before the committing magistrate, or to the verification of the information in the district court. (*People v. Harris* (Mich.) 61 N. W. 871; *Lambert v. People*, 29 Mich. 71; *State v. Fall*, 56 Wis. 577, 14 N. W. 596; *State v. Ruth*, 21 Kan. 583; *In re Lewis*, 31 Kan. 71, 1 Pac. 283; *State v. Blackman*, 32 Kan. 615, 5 Pac. 173; *State v. Otey*, 7 Kan. 69; *State v. Stoffel*, 48 Kan. 364; *State v. Osborn*, 54 Kan. 473.)

In *State v. Barnes*, 1 N. D. 131, 54 N. W. 541, it was decided that, where a defendant had waived a preliminary examination before a committing magistrate, he had placed himself in a position which authorized the state's attorney to file an information against him for the same offense charged in the original complaint. The provision of the Dakota constitution requiring examinations before informations are filed is substantially like our own; and it was held that where an examination has been tendered a defendant even upon a fatally defective complaint, yet, if he has the privilege of an examination, and inter-

poses no objection to the complaint, the constitution and the laws have been complied with. The case is applicable to the one at bar. This defendant, according to the record, exercised the privilege, and after testimony was introduced the magistrate bound him over.

The defendant is correct in his argument that the information in this case could only have been filed after examination and commitment. Leave of court never having been obtained, these two steps must necessarily have been taken before any right was conferred upon the county attorney to file or present an information.

But, if these preliminary requisites had not been correctly pursued, an appropriate remedy was by motion to quash upon the ground that the information was not presented as prescribed by law. Section 206, Criminal Practice Act, applies to informations, and the statute includes and contemplates, as a reason for quashing, such a defect (if it was a defect at all) as the defendant here complains of, provided the question of the regularity of the original complaint had not already been waived altogether by the failure of the defendant to object thereto before the committing magistrate. (*People v. Dowd*, 44 Mich. 488, 7 N. W. 71; *People v. Murphy*, 56 Mich. 546, 23 N. W. 215; *People v. Gardner*, 62 Mich. 307, 29 N. W. 19.)

The record does not show that any leave was asked or granted to withdraw the plea of not guilty interposed at the first trial, and substitute another and different one at the second trial. Defendant, therefore, by the statute, waived any grounds of objection to the information which might have been properly raised by motion to quash. (Criminal Practice Act, § 208.)

In deciding the foregoing question of practice, the court by no means intend to hold that the verification of the original complaint in this case by the sheriff of Jefferson county, on information and belief, was defective. There is much force in the argument that, where a man verily believes that a crime

has been committed, it is the best knowledge of which he may be possessed. It has been the practice, for years and years, for officers to swear out warrants based upon information and belief, and we are not prepared to hold that the oath or affirmation required by the constitution to be made to any complaint charging a person with felony, for the purpose of causing an arrest and examination to answer to a charge in another court, must be made upon the direct knowledge of the person taking the oath. A sheriff is seldom in possession of facts within his own positive knowledge. Again, those who are in possession and knowledge of the exact facts are often unwilling to become complainants themselves. It seems to us that the proper construction of the words "probable cause," as used in the constitution, may be facts embodied in a complaint which charges the offense upon information and belief. (See Washb. Cr. Law, p. 107; *State v. Davie*, 62 Wis. 305, 22 N. W. 411; *State v. Bennett*, 102 Mo. 376, 14 S. W. 865; *State v. Ellison*, 14 Ind. 380; *Franklin v. State*, 85 Ind. 99; *Com. v. Phillips*, 16 Pick. 211.)

The defendant, before the jury were impaneled, interposed a plea of former jeopardy, upon the ground that heretofore, "on the — day of January, 1893, a jury was duly impaneled and sworn to try the defendant upon the information herein filed, and that said cause was thereupon tried before the said jury, which said jury, after hearing the evidence submitted on behalf of the state and of the defendant, retired, in charge of an officer, to deliberate on their verdict; that the said jury, upon so deliberating, unanimously agreed that the said defendant be acquitted of the charge, as set forth in full in the information, to wit, of assault with a deadly weapon with intent to do great bodily harm, so far as the same constitutes a felony, and thereupon agreed that he be found guilty of simple assault; that thereupon a disagreement ensued among the jurors upon said jury as to the amount of the fine which should be by the said jury imposed, eleven of the jurors comprising said jury voting and agreeing to impose a fine of fifty dollars and

costs, and one jurymen of the said jury insisting upon a fine of five hundred dollars and costs; that, the state of deliberations of the said jury being as heretofore set forth, the said jury returned into court, and reported that they could not agree, whereupon the said jury was by the court discharged. And the defendant avers that the discharge of the said jury by the court was without actual necessity, in that not only could the said jury agree, but they had then actually agreed, for that they had unanimously agreed to acquit the said defendant of the felony charged in the information, and that he should not be punished by imprisonment in the state's prison, and more than two-thirds of the said jury, to wit, eleven, had agreed to return a verdict of guilty of assault simply, and to fix the fine at fifty dollars, and these facts said defendant is ready to verify. To which plea the state demurred, the demurrer was by the court sustained, and the defendant excepted."

By the plea of former jeopardy, defendant substantially alleged that there might have been an acquittal or conviction if the jury had understood the law at the first trial, and if the trial judge had not erred in discharging them when he did. But whether they correctly or incorrectly understood their privileges, or whether they were or were not properly charged, is immaterial, in the light of the fact that they did not deliver or return any verdict at all into court, as required by section 334 of the Criminal Practice Act. And until a verdict is filed by the clerk of the court a jury may change their finding at pleasure, or one juror may dissent, and thus defeat the verdict entirely, unless they afterwards agree before a separation. (Bish. Cr. Proc. § 1003; *Morris v. Burke*, 15 Mont. 214; *Grant v. State*, 33 Fla. 291, 14 South. 757; *In re Thompson*, 9 Mont. 381.)

It logically follows that there having been no complete verdict by delivery, there was no legal verdict at all, and the offer of defendant to show an agreement of the jurors in their room was properly excluded by the court. (Vide authorities

supra; *People v. James*, 97 Cal. 400, 32 Pac. 317; *State v. Clementson*, 69 Wis. 628, 35 N. W. 56.)

The jury stated to the court that they were unable to agree. How long they deliberated before making this statement, we cannot say, as the record contains no dates, except the ——— days of January, 1893. They may have deliberated only one hour, or the whole of that month, so far as we can tell. Indeed, the term of the court may have about come to an end when they were discharged. The appellant did not object to their discharge. It is therefore impossible for us to say that the court abused its discretion in discharging them when it appeared, as it did, that they could not agree on a verdict. The power to discharge them, under the facts disclosed, was in the court. (Criminal Practice Act, § 331.) This power was apparently exercised within the limits of judicial discretion. (*State v. Reinhart*, 26 Or. 466, 38 Pac. 823; *State v. Jorgenson* (Idaho) 32 Pac. 1129; Proff. Jury Trials, §§ 475–491; *State v. Shaffer*, 23 Or. 555, 32 Pac. 545; *People v. Goodwin* (N. Y.) 9 Am. Dec. 203; *People v. Olcott* (N. Y.) 1 Am. Dec. 168.

Our conclusion is that there never was any former jeopardy, and that the district court properly sustained the demurrer of the state.

We find no error in the case. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

STACKPOLE, CONTESTANT AND APPELLANT, v. HALLAHAN, CONTESTEE AND APPELLANT.

[Submitted April 5, 1895. Decided April 15, 1895.]

STATUTES—Adoption of foreign statute—Construction.—As a general rule, by the adoption of a statute of a foreign country, the subject of which is new to this jurisdiction, the construction given to such statute by the courts of such foreign country is impliedly adopted, provided our own statute, as enacted, is silent as to the matter of construction. (*Lindley v. Davis*, 6 Mont. 453; *Territory v. Stears*, 2 Mont. 330; *First National Bank v. Bell etc. Min. Co.*, 8 Mont. 32, cited.

16	40
16	388
17	364

16	40
18	509
18	547
18	507
19	255
19	289

16	40
20	558

16	40
22	203

16	40
25	27

16	40
28	86

16	40
29	555

SAME—Election laws—Construction.—In the construction of election laws in a monarchy, the tendency is to limit and restrict the electoral franchise, but an opposite construction prevails in a republic. The whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of electors, and an election law which we import from a monarchy should not, therefore, be subjected strictly to the rule that the importation of a statute imports also its construction. (*Price v. Lush*, 10 Mont. 61, modified and limited.)

SAME—Same—"Australian Ballot Law"—Certificate of nomination.—The provisions of sections 11 and 12 of the act of March 13, 1889, commonly called the "Australian Ballot Law," prescribing certain facts to be stated in a certificate of nomination, are not to be held to be mandatory in a case where the nomination has been duly made, a certificate filed, the name placed upon the ballot, the candidate voted for and elected by a plurality of all the legal votes cast, and where the effect of giving a mandatory construction to such provisions would be absolutely to disenfranchise a plurality of the voters of the district, although the honesty and fairness of the election have never been questioned. The act does not contemplate that an election shall be declared null by reason of nonprejudicial defects in the nominating certificate.

SAME—Same—Sufficiency of certificate of nomination.—In the case at bar W. was nominated by a political convention as a candidate for county treasurer, but his certificate of nomination was never filed, and he declined the nomination to the county committee of the party, and the said committee filled the vacancy by nominating H., and by filing a certificate of his nomination with the county clerk. In making and filing H.'s certificate, it did not technically comply with the provisions of sections 11 and 12 of the Australian Ballot Law (Act of March 13, 1889) in the following particulars: 1. W. did not decline his nomination in writing, notifying the officer, with whom the certificate of nomination is required to be filed, of his declination; 2. H.'s certificate did not show that he was nominated to fill a vacancy; 3. Nor set forth the cause of the vacancy; 4. Nor give the name of the person for whom H. was to be substituted; 5. Nor set forth that the committee had authority to fill the vacancy; 6. Nor set forth in direct language the business address of H; 7. Nor the business address of the chairman or secretary of the party committee making the nomination. Held, that no objections to such defects having been made until after an election, honestly and fairly conducted, the provisions of the statute as to certifying nominations should be construed as directory only, and the election should stand. (*First National Bank v. Nell*, 13 Mont. 382; *State ex rel. Pigott v. Benton*, 13 Mont. 306, cited.)

Appeal from Third Judicial District, Deer Lodge County.

ELECTION CONTEST. Judgment was rendered by BRANTLEY, J., declaring the election void. Reversed.

Statement of the case by the justice delivering the opinion.

This is an election contest, a statutory proceeding brought by E. S. Stackpole, asking that it be determined that he, and not D. F. Hallahan, was elected treasurer of Deer Lodge county, at the general election in November, 1894. It was determined by the district court that neither Stackpole or Hallahan was elected. Each party appeals.

For convenience in this statement, and in the opinion below, instead of speaking of the parties as appellant or respondent,

ent, or contestant or contestee, we will simply use their personal names. The case was tried to the court without a jury. Very ample findings of fact and conclusions of law were made by the court. There is no question here as to the evidence, and our consideration of the case is simply whether the judgment upon the findings was correct.

The facts, as they appear in the findings, are as follows: At a convention of the Republican party of Deer Lodge county, held September 1, 1894, Stackpole was nominated for county treasurer. A certificate of his nomination was duly filed with the county clerk and recorder. No question is made as to his certificate. The People's party of Deer Lodge county regularly held their convention on the 23d day of June, 1894. That convention duly nominated J. R. Whitmire for county treasurer. No certificate of Whitmire's nomination was ever made by the officers of the convention, or filed with the county clerk. That convention named a county central committee. It also passed a resolution authorizing that committee to fill any and all vacancies on the ticket of the People's party for county officers that then existed, or that might thereafter occur from any cause. No certificate of Whitmire's nomination being filed, he declined to be a candidate for county treasurer, and notified the county committee of his declination of said nomination, and his refusal to be a candidate. The county committee thereupon duly met on September 5, 1894. The whole committee was present. They met for the purpose of nominating a candidate of their party for the office of county treasurer, to fill the vacancy caused by the declination of Whitmire. At that meeting D. F. Hallahan was nominated for the office of county treasurer, to fill the vacancy. The chairman and secretary of the committee were duly instructed to file the proper certificate of his nomination. They thereupon made and filed with the county recorder the following certificate:

“Deer Lodge, Mont., 10|3, '94. At a regular meeting of the county central committee of the People's party of Deer Lodge Co., held at Anaconda, Mont., Sept. 5th, 1894, the fol-

lowing nominations were made for county treasurer: D. F. Hallahan, of Anaconda, Mont., wholesale liquor dealer. For county surveyor, J. P. Mitchell, of Deer Lodge, Mont., surveyor and assayer. Chairman, Dr. A. H. Mitchell, physician, Deer Lodge, Mont. E. B. Hosford, bookkeeper, Anaconda, Mont. E. B. Hosford, Sec. A. H. Mitchell, Chairman."

This was filed on October 3d, within the time required by law. The clerk and recorder of Deer Lodge county made up the official ballot for use at said election from the nominations on file in his office. On that ballot he placed the names of E. S. Stackpole, Republican; D. F. Hallahan, Populist; and James B. McMaster, Democrat,—as candidates for county treasurer; also all the candidates of the different parties for various offices. He caused the same to be published daily for more than 10 consecutive days immediately prior to the said election, in the *Anaconda Standard*, a daily newspaper of general circulation, published in the county. Stackpole had knowledge of this publication. Hallahan's name was printed on the official ballot used at that election, and his name was not written thereon by any elector. At that election Stackpole received 1,554 votes; Hallahan, 1,794; and McMaster, 1,181. All these ballots were duly and regularly counted and canvassed, and the returns duly made to the clerk and recorder within the time allowed by law. They were counted and tabulated by the canvassing board, which declared that Hallahan had received the highest number of votes for county treasurer, and declared him elected, and issued him a proper certificate. Hallahan qualified for taking said office by filing his oath and bond. The Republican party, People's party and Democratic party are each political organizations existing in said county. The business of D. F. Hallahan is that of wholesale liquor dealer, and his residence and business address is Anaconda, Mont. The business of the chairman of the county committee of the People's party is that of physician. His name is A. H. Mitchell, and his business address and residence are Deer Lodge, Mont. The business of the secretary of the committee, E. B. Hosford,

is that of bookkeeper, and his business address and residence are Anaconda, Mont. Contestant, E. S. Stackpole, resides at the town of Deer Lodge, which was his business address, and his business was, at the time said convention was held and certificate filed, that of justice of the peace. That the residence of the chairman of the said Republican convention was Anaconda, Mont.; his business, merchant; his business address, Anaconda, Mont. That the residence of the secretary of said Republican convention was Deer Lodge, Mont.; his business, hotel clerk; his business address, Deer Lodge, Mont.

Upon these findings the court filed the following conclusions of law:

“(1) That the contestee, D. F. Hallahan, was not nominated for the office of treasurer of Deer Lodge county, Mont., to be voted on as a candidate at the general election held for county and other offices in the state of Montana, on November 6, 1894, by any convention of delegates representing a party or principle, nor by any committee duly authorized for that purpose by such a convention, nor by the electors of said county.

(2) That the name of said Hallahan was improperly printed upon the official ballot prepared for said election by the clerk and recorder of said Deer Lodge county.

(3) That the said Hallahan was not elected to the said office of treasurer of Deer Lodge county at said election, and is therefore not entitled to hold said office.

(4) That E. S. Stackpole, the contestant, did not receive the highest number of legal votes, and is therefore not entitled to be declared elected, nor to hold said office of treasurer for said county of Deer Lodge.

(5) That no other candidate or person received any greater number of votes than the said E. S. Stackpole, and there is therefore no other person entitled to be declared elected or to hold said office.

(6) That no one was elected to the office of treasurer of Deer Lodge county at the general election held for county and other officers in the state of Montana on November 6, 1894, and said election was void as to said office.

Let judgment be entered accordingly, each party paying his own costs."

Judgment was then entered that neither Stackpole nor Hallahan had been elected treasurer of Deer Lodge county. As noted above, each party appeals.

The portions of sections 11 and 12 of the act of March 13, 1889, commonly called the "Australian Ballot Law," which are applicable to this contention, are as follows:

"Sec. 11. Whenever any person nominated for public office as in this act provided, shall at least twenty days before election, * * * * in a writing signed by him, notifying the officer with whom the certificate nominating him is by this act required to be filed, that he declines such nomination, such nomination shall be void. * * * *

"Sec. 12. Should any person so nominated die before the printing of the tickets, or decline the nomination, as in this act provided, or should any certificate of nomination be or become insufficient or inoperative from any cause, the vacancy or vacancies thus occasioned may be filled in the manner required for original nominations. If the original nomination was made by a party convention which had delegated to a committee the power to fill vacancies, such committee may, upon the occurring of such vacancies, proceed to fill the same. The chairman and secretary of such committee shall thereupon make and file with the proper officer a certificate setting forth the cause of the vacancy, the name of the person nominated, the office for which he was nominated, the name of the person for whom the new nominee is to be substituted, the fact that the committee was authorized to fill vacancies, and such further information as is required to be given in an original certificate of nomination. The certificate so made shall be executed in the manner prescribed for the original certificate of nomination, and shall have the same force and effect as an original certificate of nomination. When such certificate shall be filed with the secretary of the state, he shall, in certifying the nominations to the various county clerks, insert the name of the person who

has thus been nominated to fill a vacancy in place of that of the original nominee. And in the event that he has already sent forth his certificate, he shall forthwith certify to the clerks of the proper counties, the name and description of the person so nominated to fill a vacancy, the office he is nominated for, the party or political principle he represents, and the name of the person for whom such nominee is substituted."

The People's party convention delegated to its county committee power to fill vacancies on the People's party county ticket. The county committee filled the vacancy caused by the declination of Whitmire by nominating Hallahan, and by filing a certificate of his nomination with the county clerk. That certificate was defective; and did not comply with the provisions of said sections 11 and 12, in the particulars as follows, which we will note seriatim:

(1) Whitmire did not "decline the nomination as in this act provided." Section 12. To decline a nomination as in the act provided is to notify, in writing signed by the party declining, "the officer, with whom the certificate nominating him is by the act required to be filed, that he declines such nomination." Section 11.

(2) Hallahan's certificate itself does not show that he was nominated to fill a vacancy.

(3) The certificate does not set forth the cause of the vacancy.

(4) The certificate does not give the name of the person for whom Hallahan was to be substituted.

(5) The certificate does not set forth that the committee had authority to fill the vacancy.

(6) The certificate does not set forth in direct language the business address of Hallahan.

(7) The certificate does not set forth in direct language the business address of the chairman or secretary of the People's party committee.

In these seven items, in making and filing of Hallahan's certificate, it did not technically comply with the provisions of

section 11 and 12 of the Australian ballot law. For these reasons the district court held that Hallahan was not nominated, and, not being nominated, was not elected treasurer of Deer Lodge county.

W. H. Trippet and Rogers & Rogers, for Plaintiff.

All the legal points involved in this case have been adjudicated by this court, and in favor of the contestant, in *Price v. Lush*, 10 Mont. 61. The nomination of Hallahan cannot be treated as an original nomination made by the People's party convention, as was the nomination of Benton, adjudged to be in *State v. Benton*, 13 Mont. 306, for the apparent reason that said convention made an original nomination in the person of Whitmire, and when the convention passed a resolution empowering the county committee to fill all vacancies then existing, there was no vacancy existing in the office of county treasurer. Counsel cited also *Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491; *Ferris v. Higley*, 20 Wall 375.

T. O'Leary and Smith & Word, for Defendant.

If section 12, of the act of 1889, is to be literally followed in all cases, it must be conceded that the certificate in this case falls short of the requirements of that section. That section is, however, intended to be followed only when a certificate of nomination has been made and filed with the county clerk. (See *Lucas v. Ringsrud*, 53 N. W. Rep. 426.) If the case of *Price v. Lush*, 10 Mont. 61, is to be followed, then the certificate of Hallahan is defective; but if the doctrine in the later cases of *Simpson v. Osborne*, 52 Kan. 328, and *State v. Benton*, 13 Mont. 306, is correct, then the certificate of Hallahan conforms thereto. (See as to the proper construction to be given to section 19, of the ballot law of 1889. *Allen v. Glenn*, 17 Col. 338; 31 Am. St. Rep. 304; *Bowers v. Smith*, 111 Mo. 45; 33 Am. St. Rep. 491; *State v. Saxon*, 30 Fla. 668; 32 Am. St. Rep. 46; *Simpson v. Osborne*, 52 Kan. 328; *Rothburn v. Hamilton*, 37 Pac. Rep. 20; *Boyd v. Mills*, 53 Kan. 594.)

The doctrine as laid down in *Price v. Lush*, 10 Mont. 61, if followed to its logical end, establishes this condition of affairs: That the acts of officers of a committee or convention are made to control the election, and may disfranchise a large majority or plurality of the voters of any division of a state or even of the whole state. This is contrary to the general doctrine on the subject, that the acts of any officer of registration or election, when free from fraud, will not vitiate an election or default the will of the voters. (McCrary on Elections, 3105.) The court below found that the votes cast for each of the candidates for treasurer were all cast by legal and qualified electors, and that contestee Hallahan received a plurality of 240, being the highest number of the votes of the legal or qualified electors and hence legal votes, and under the state constitution (Const. Art. 9, § 13), he was by the canvassing board declared elected, and should be so declared by the court. (McCrary on Elections, §§ 292, 293; *Commonwealth v. Cluly*, 56 Pa. St. 270; *Sanders v. Haynes*, 13 Cal. 145; *State v. Smith*, 14 Wis. 497; *Opinion of Judges*, 32 Me. 597; *State v. Boat*, 46 Mo. 528; *State v. Vail*, 53 Mo. 97; *People v. Clute*, 50 N. Y. 45.)

DE WITT, J.—We are of opinion that the learned judge of the district court was justified in holding, as he did, as to Hallahan's certificate in this case, on the authority of *Price v. Lush*. 10 Mont. 61. We are also of opinion that, while the judgment in *Price v. Lush*, was perhaps correct, the doctrine of that case must be modified in some respects. *Price v. Lush*, was one of the pioneer American decisions upon the Australian ballot law, and at the time of its rendition no American authority was at the command of this court.

As to the decision of *Price v. Lush*, perhaps we may remark that we are willing, in the language of Mr. Justice Field in the case of *Barden v. Northern Pacific Railroad Co.*, 154 U. S. 322, 14 Sup. Ct. 288, to "take the responsibility of any conflict with the views now expressed. It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previ-

ous declarations. These doctrines only will eventually stand which bear the strictest examination and the test of experience.”

In what respect we shall modify the decision of *Price v. Lush* will appear as we treat the case before us. We shall proceed to examine the defects in Mr. Hallahan's certificate, as they are set forth and numbered in the statement preceding this opinion, and shall state our views as to what should be the result of these defects when they are brought to the consideration of the court at the time and under the facts and circumstances shown by a court's finding of facts in this case.

1. It is true that Whitmire did not decline his nomination in the manner provided by sections 11 and 12 of the Australian ballot law. That statute provides that a written declination shall be filed with the officer with whom the certificate of nomination of such person declining is required to be filed. The county clerk is that officer in this case. But Whitmire's certificate of nomination had never been filed. He refused the nomination before the time expired in which his certificate must be filed. The county clerk had no evidence filed with him showing that Whitmire had been nominated. He officially knew nothing about Whitmire's nomination. If a nominee declines a nomination, it certainly is an expedient provision of law that the officer, holding the official record of the nomination shall have a formal written declaration of the declination of the candidate, that such officer may have substantial authority for leaving a nominee's name off of the ticket. But the county clerk needed no such authority in this case to leave Whitmire's name from the ticket. He never would have put his name on the ticket. He never had authority so to do. What is the substantial reason, then, of requiring the county clerk to have authority to leave Whitmire's name off of the ticket when he never had authority to put it on? It would be a ceremony wholly useless to any one, benefiting no one, securing no one any rights, and the omission of it working no one any wrong. Without holding fully, in this respect, that

the reason of the law ceasing the law ceases, for there might perhaps be circumstances when the question could be raised in some connections, which do not now occur to us, where we might not be prepared to hold that the law ceased, yet we do hold that under the findings of fact in this case, which we shall more fully discuss below, the omission of Whitmire to file a declination with the county clerk was not such a substantial disregard of the statute as to wholly nullify Hallahan's nomination, in consideration of the other facts of this case, and the time and place and manner in which the objection was made for the first time.

2. Our view of this defect No. 1 disposes of defect No. 2. (See statement of facts.) Hallahan's certificate did not show that he was nominated to fill a vacancy, but, as Whitmire's certificate had never been filed, the information to the county clerk that Hallahan's nomination was to fill a vacancy was not useful or important. When Hallahan's certificate came to the county clerk it worked no change in the records as they were before the clerk. No nomination having been filed with the county clerk, he had no substitution to make. Hallahan was not to be put in the place of any one already on the records of the clerk. By no possibility could any one be injured upon the records with the clerk. Again, was this such a substantial disregard of the statute as should nullify Hallahan's nomination, when the question is raised as it is in this case?

Defects 3 and 4 are that the certificate does not set forth the cause of the vacancy, and does not give the name of the person for whom Hallahan was to be substituted. These defects fall under the same view as we have expressed as to those numbered 1 and 2.

5. The fifth defect is that the certificate does not set forth that the committee had authority to fill the vacancy. This is true. The law requires that this fact should be set forth. The certificate did not give this fact. It was a fact, however, that the committee did have authority to fill a vacancy. See the facts as set forth in the statement of the case. Therefore, the

committee having full power to fill the vacancy, is the fact that they did not state this in the certificate such a defect as shall nullify the election, under the circumstances before us in this case?

6 and 7. The certificate does not set forth in direct language the business address of Hallahan, or that of the chairman or secretary of the People's party committee. The certificate gives the name and the address and the business of both Hallahan and the chairman and secretary of the committee. The statute says that the certificate shall give the business address also. We are of opinion that, when the name and business and address are given, it is an extremely technical objection to say that the business address is not, in effect, given.

Such are the defects in the certificate of Hallahan's nomination. Technically, these defects are in disregard of the provisions of sections 11 and 12 of the ballot law.

As we have shown, and as we think would be accepted by anyone, none of these defects are extremely substantial matters, when first brought to the attention of a court, as in this case. But we wish here to guard our language carefully. We will state that it may be that there are times, circumstances, or places, or manner of raising the question where and when the defects described may, by a court, be considered, for some reasons, substantial. But in this inquiry we limit ourselves to the consideration of these defects as they are brought before the court at this time, in the manner and under the circumstances, and in connection with the facts as they appear by the findings of the court in this case. We believe that, from the point of view which we occupy, and which the district court occupied, as we shall demonstrate below, these defects in Hallahan's certificate are of the nature of the mint, the anise, and the cummin, and not of the weightier matters of the law. (Matthew, xxiii., 23.)

It is now important to note that the defects in Hallahan's certificate were simply the absence of statements of certain facts, and not the absence of the existence of the facts. While

it is not stated in the certificate to be the fact, still it is the fact, that Whitmire declined his nomination in the only manner practicable for him to make his declination. Also it is the fact that Hallahan was nominated to fill the vacancy. It is the fact that the cause of the vacancy was Whitmire's declination. It is the fact that Whitmire was the person for whom Hallahan was substituted. It is the fact that the committee had authority to fill the vacancy. It is the fact that the business address of Hallahan and the chairman and secretary of the People's party committee was the same as the address of these persons given in the certificate. It is the fact that Hallahan was duly nominated by the committee having such authority. He was qualified to hold the office. He received 1,794 of the votes cast, a plurality of 240 over any other candidate. The ballots cast for him were regular, and were cast by legal voters. He was the choice of the nominating authority of his party. He was the choice of the voters of his party. His nomination, or his certificate of nomination, was never attacked, until after an election, the honesty and fairness of which have never been questioned.

Therefore we come to this proposition: Under all the facts in this case, does the Australian ballot law contemplate that an election shall be declared null by reason of the defects in the nominating certificate such as exist in this case? We think not.

In holding this view, we are constrained to depart, to some extent, from the doctrine announced in *Price v. Lush*, supra. In that case it was said: "The statement of contest points out many particulars wherein the foregoing requirements of the statute have not been complied with. Are these provisions directory or mandatory? When this question is decided, the appeal will be determined." 10 Mont. 68. In the conclusion of the opinion it was said: "The principle which has called into being this law, that prescribes the conditions for the nominations of candidates for office before the day of election, demands the enforcement of every provision." 10 Mont. 72.

That case has generally been thought to hold that every pro-

vision of the ballot law must be strictly complied with, or the election of a candidate not so complying will be void. But it was not necessary to so hold in that case. The case was decided upon the pleadings. It was held that the statement of the contest was sufficient in law. That statement set forth a violation of almost every provision of the ballot law. All that this court necessarily held in that case was that a motion to quash the statement should not have been sustained. But we are satisfied that the decision went too far in holding absolutely (if it did so, as generally thought) that all the provisions of the ballot law are mandatory, to the extent of invalidating an election if some detail as to a nominating certificate is omitted. The law may be mandatory in this: that, as it requires certain things to be done, if the direct question arose as to their being done or left undone, in some proceeding to determine that question, a court might hold that they should be done. As, for instance, the issuing of some process forbidding the filing of the certificate which did not comply with the law. (*Miller v. Pennoyer*, 23 Or. 364, 31 Pac. 830.) But that is a different proposition from holding that, if such things are not done, the result must be disenfranchisement of a plurality or majority of the voters of the district.

In this connection we cite as follows from the Oregon case, just above referred to: "But however this may be, and whatever may be the correct interpretation of section 49, we are all agreed that the mistake, if it was a mistake, in printing the name of Mr. Pierce on the 'official ballot,' in both the People's and democratic groups of electors, did not deprive the voter who cast such a ballot of the elective franchise, or the candidate for whom it was cast, of the benefit of such vote. Under the law as it now exists, neither a voter nor candidate has any control or voice whatever in the arrangement and publication of the names or forms of the ballot, and the voter is either compelled to vote the 'official ballot,' as prepared by the county clerk, or not vote at all. In such case, in the absence of an affirmative declaration in the statute that a ballot containing the name of a candidate in more than one place is

void, and shall not be counted, we are unable to agree to the doctrine that an error of the county clerk in construing a doubtful provision of the law should disenfranchise a large number of voters, who are in no way responsible for the error or mistake; and such is the effect of the decisions under similar ballot laws. (*Bowers v. Smith*, 111 Mo. 45, 17 S. W. 761, 20 S. W. 101; *Allen v. Glynn*, 17 Col. 338, 29 Pac. 670; *Northcote v. Pulsford*, 44 Law J. C. P. 217.) The law is 'mandatory,' in the sense that it demands and requires the county clerks, in the preparation of the 'official ballot,' to strictly comply with all its provisions, but not in the sense that a voter's right to exercise its elective franchise will be lost because of some technical mistake of the county clerk in printing the names of candidates upon the ballot. Such a construction of the law would not only render the election invalid on account of an honest mistake of a county clerk, but would open the door to the gravest fraud. It would place the power in the hands of a dishonest officer to disenfranchise the voters of his county, as well as cause the defeat of any particular candidate. To defeat the will of the people or a particular candidate, it would only be necessary to furnish the electors, or a part of them, with ballots slightly variant or differing from those prescribed by law. Unless the law is clearly mandatory, or in some way declares the consequences of a departure from its provisions, the court ought not to defeat the will of the people, when fairly expressed, because of some technical error or mistake in the form of the ballot; and in this case there is no claim or suggestion of fraud on the part of any one, or that the returns now in the possession of the secretary of state do not correctly represent the will of the people, as expressed at the polls."

As to the views which courts have taken of defects in certificates of nomination, and as to the spirit of the provisions of the Australian ballot law, we quote from the following decisions:

"We are unable to see that very serious harm can come from the printing of the name of a candidate on the official

ballot, even though the certificate of his nomination be informal. The people, on election day, will vote only for the candidates of their choice, and are not likely to be seriously misled by any fraudulent or unauthorized nomination. On the other hand, most deplorable consequences might ensue if contentions over the regularity of nomination papers are to be prolonged past the time when the officers charged with the duty of certifying to the nominations, and causing ballots to be printed, are required by law to act in preparing for the election." (*Simpson v. Osborn*, 52 Kan. 328.)

"The grand design of the Australian ballot law was the purity of elections, and to protect the voter, and public at large, from the effects of fraud and intimidation; and the construction given the act should, if possible, be in harmony with its beneficent object. A cardinal rule for the construction of statutes is that, in case of ambiguity in an act, the courts will adopt that construction best adapted to promote the general object, and most conformable to reason and justice. (See Sedg. St. & Const. Law, 196.) * * * We must not, however, be understood as holding the provision of the ballot law under consideration to be mandatory. Generally speaking provisions which are not essential to a fair election will be held to be directory merely, unless the contrary clearly appears from the act itself. *State v. Russell*, 34 Neb. 116, 51 N. W. 465, and authorities cited." (*State v. Allen* (Neb.) 62 N. W. 35.)

"Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favor, and exceptions which exclude a ballot should be restricted, rather than extended, so as to admit the ballot if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result, as shown by the ballots deposited by legal electors, must not be set aside, except for causes plainly within the purview of the statute." * * *

* "The object intended to be effected was the independence of the voter, and this was sought to be secured by prescribing to a certain extent the form of the ballot, and excluding from

it whatever was within the prohibition of the provision, and thereby securing the secrecy of the ballot; inviolable secrecy as to the person for whom an elector may vote being the material guaranty of the constitutional mandate that voting at popular elections shall be by ballot. (*State v. Anderson*, 26 Fla. 240, 259, 8 South. 1.) The nearer the lawful approach to a perfect uniformity of ballots, the more perfectly is the secrecy of the ballot, and consequently the independence of the voter, secured. The greater the uniformity, the less the possibility of distinguishing marks. It is, however, not to be lost sight of, that a ballot will never be vitiated by anything which is not clearly within the prohibiting words and meaning of the statute. The elector should not be deprived of his vote through mere inference, but only upon the clear expression of the law." (*State v. Saxon*, 30 Fla. 668.)

"The departure from the law in matters which the legislature has not declared of vital importance must be substantial in order to vitiate the ballots. This appears to be the general current of all the authorities. In *Bowers v. Smith*, 111 Mo. 61, 20 S. W. 101, it is said: 'If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor, as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will.' " (*Boyd v. Mills*, 53 Kan. 594.)

Returning again to *Price v. Lush*, we observe that the doctrine was there invoked that, by the adoption of a statute of a foreign country, the subject of which was new to this jurisdiction, we impliedly adopted the construction given to such statute by the courts of such foreign country, provided our own statute, as enacted, was silent as to the matter of construction. Eminent authority was cited in support of that doctrine, as remarked in *State v. Barber*, (Wyo.) 32 Pac. 14. That this general doctrine should obtain we have no doubt. It has

often been declared by this court. (*Lindley v. Davis*, 6 Mont. 453; *Territory v. Stears*, 2 Mont. 330; *First National Bank v. Bell S. & C. Min. Co.*, 8 Mont. 32.)

But we think that in *Price v. Lush*, the doctrine should have been taken with a modification, which escaped the attention of the court. The Australian ballot law was adopted from a monarchical government,—a limited monarchy, perhaps, but still of the nature of a monarchy. The law was brought from such a government to a republic. In the former the tendency is to limit and restrict the electoral franchise. In the latter the tendency is to extend the same. The particular form of ballot law known as the “Australian System” was new to our jurisdiction. But construction of election laws generally was not with us a new field of law; and, in the construction of election laws, the whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of the electors. As said by Chief Justice Groesbeck, in *State v. Barber* (Wyo.) 32 Pac. 28: “Although our statute is a very faithful copy of the Australian ballot law, I see no reason for adopting the construction of the British courts, which appears to be most rigid. I do not see why this law should be more strictly construed than any other statute, or why different rules of construction from those invariably followed by the courts should be adopted in construing the statute.” See, also, cases above cited, and cases cited in the brief of counsel for Hallahan.

We are of opinion that an election law imported from a monarchy to a republic should therefore not be subjected strictly to the rule that the importation of a statute imports also its construction. In this respect, and for the reason suggested, we are of opinion that *Price v. Lush* extended the rule to an application not warranted by our history, our institutions, and the former decisions of American courts upon the construction of election laws. These views lead us to the opinion that the provisions of our Australian ballot law should not be construed as strictly mandatory, when the question of their

observance or disobedience is raised under the facts and circumstances found in the case at bar. *Price v. Lush*, however, is distinguishable from the case at bar in this respect, as remarked above in this opinion, that that case was decided upon the pleadings, and nearly the whole ballot system appeared to have been disregarded. It did not in that case appear that facts omitted to be stated in the certificate were absolutely existent; but in the case before us the defects in the certificate of nomination were simply omissions to state facts not particularly substantial, when, indeed, the facts so omitted to be stated did exist, and were so found by the court on the trial. That was not the case in *Price v. Lush*.

As to whether the provisions, here under consideration, of the Australian Ballot Law, as to certifying a nomination, are to be considered directory or mandatory, we are of opinion that the correct view is this: That while courts may have held that such provisions are mandatory, when the question was directly raised in some proceeding demanding that such provision should be complied with, or in some proceeding asking that an officer be required to file a certificate which was defective, and he made such defect a defense for his refusal, yet they should not be held to be mandatory in a case like the one at bar, where the nomination has been duly made, a certificate filed, the name placed upon the ballot, the candidate voted for and elected by a plurality of all the legal votes cast, and the effect of giving a mandatory construction of the provision under consideration is absolutely to disenfranchise a plurality of the voters of the district, when no question is made that their will has not been fully, fairly, and honestly expressed at the polls. (*State v. Barber* (Wyo.) 32 Pac. 28; *Lucas v. Ringsrud*, 3 S. D. 355, 53 N. W. 426; *State v. Saxon*, 30 Fla. 668, 12 South. 218.)

In this connection section 13 of article IX. of the constitution is pertinent: "In all elections held by the people under this constitution, the person who shall receive the highest number of legal votes shall be declared elected."

To hold such provisions of a law mandatory is not within the

rules as to mandatory and directory construction of statutes. We said in *First National Bank v. Neill*, 13 Mont. 382. "As to whether language should be construed as mandatory or directory, the doctrine is well stated in *Wheeler v. City of Chicago*, 24 Ill. 105, 76 Am. Dec. 736, as follows: "The word "may" is construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or performance of the duty to which it refers. And so, on the other hand, the word "shall" may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it that construction; But, if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely." So in the case at bar. The moving party's right to his compensation given by statute for the trouble and expense of his motion depends upon giving the word 'shall' an imperative construction, and, as remarked in the Illinois case, 'the presumption is that the word was used in reference to such right or benefit.' " (See, also, *Blake v. Railroad Co.*, 39 N. H. 435; *Ex parte Jordan*, 94 U. S. 251; Sedg. St. & Const. Law. 316-325.)

We note the following from Endlich on Interpretation of Statutes, section 431: "When a statute requires that something shall be done or done in a particular manner or form, without expressly declaring what shall be the consequence of noncompliance, the question often arises, what intention is to be attributed by inference to the legislature? Where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention." Section 433: "It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience (and, that,

where an act requires a thing to be done in a particular manner, that manner alone must be adopted). But the question is in the main governed by considerations of convenience and justice, and when nullification would involve general inconvenience (or great public mischief) or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature." Section 436. "On the other hand, the prescriptions of a statute (often) relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those intrusted with the duty, without promoting the essential aims of the legislature. In such case, they are said not to be of the essence or the substance of the thing required, and, depending upon this quality of not being of the essence or substance of the thing required, compliance being rather a matter of convenience, and the direction being given with a view simply to proper, orderly, and prompt conduct of business, they seem to be understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, but it does not affect the validity of the act done in disregard of them. It has often been held, for instance, when an act ordered a thing to be done by a public body or public officers, and pointed out the specific time when it was to be done, that the act was directory only, and might be complied with after the prescribed time. Such is, indeed, the general rule, unless the time specified is of the essence of the thing, or the statute shows that it was intended as a limitation of power, authority, or right." Section 437. "In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be gathered from the statute, construed in the light of other rules of interpretation."

Under these views of directory and mandatory statutes, we

cannot hold that the matters omitted from Hallahan's certificate were mandatory, when the question is raised as it is in this case. The statute does not declare that noncompliance with these matters shall nullify the election. (Endlich on Interpretation of Statutes, § 431; *Boyd v. Mills*, 53 Kan. 594, '37 Pac. 18; *Keller v. Toulme* (Miss.) 7 South. 508; *People v. Board of Canvassers*, 129 N. Y. 395.) The whole aim and object of the legislature are not defeated by such noncompliance. (Endlich on Interpretation of Statutes, § 431.) If the election is to be nullified, it would, as observed in Endlich, involve general inconvenience and great public mischief and injustice to innocent persons, without promoting the real aim and object of the legislature. (Endlich on Interpretation of Statutes, § 433.) We cannot believe that such was the intention of the act.

Referring again to the case of *First National Bank v. Neill*, quoted above, we have to observe in the case at bar that the right of no one depends upon giving these provisions of the statute a mandatory construction. No right is preserved by such construction, but, on the other hand, a right would be destroyed; that is, the right of the person having the highest number of legal votes cast to be declared elected. (Const. Art. IX., § 13.) But, by giving these provisions a directory construction, this same right is preserved. Surely, such construction should prevail in this case. Such are our views as to this important matter.

It was claimed in the argument that our decision in *State v. Benton*, 13 Mont. 306, looked in the direction of the views now expressed. If it did, we are satisfied that it looked in the right direction. We said in that case: "The decision in this case is placed solely upon the ground discussed hereinbefore, and all other questions are reserved." So in this case at bar, we limit our remarks to the facts of the case, in this, namely, that when such defects in a nominating certificate as existed in the one which we have considered are brought before a court in a proceeding such as the one at bar, and with the facts as they are found here, we are of opinion that the said described

requirements of the Australian ballot law, as to certifying nominations, must be held to be directory only. Any other construction of these provisions of the Australian ballot law would convert a great reform measure into a trap and a snare for the innocent and the honest, and would subject the will of the people in elections to the accidents of inadvertence and the tricks of the disingenuous. While the statute would seek to cast out one evil spirit, it would take into the political house thus swept and garnished seven other more dangerous spirits, and the last condition of the state would be worse than the first. (Luke xii, 24, 26.)

There need be no new trial in this case. The findings are all made, and are not attacked. They are sufficient upon which to enter judgment. (*Woolman v. Garringer*, 2 Mont. 405; *Collier v. Irvine*, Id. 557; *Barkley v. Tieleke*, Id. 435.)

It is ordered that the judgment of the district court be reversed, and that the case be remanded, with instructions to dismiss the contest, and adjudge that D. F. Hallahan is the duly-elected treasurer of Deer Lodge county. Remittitur forthwith.

Reversed.

PEMBERTON, C. J., concurs.

HUNT, J., (*concurring*).—I concur in the conclusion and the reasoning of the learned opinion of Justice De Witt. But I regard the decision of the court as a reversal, rather than a modification, of the case of *Price v. Lush*, and, so regarding it, I willingly concur. I have never believed that the doctrine in the case of *Price v. Lush* could be sustained. In my judgment, it is contrary to the intent of the law itself, as well as the spirit of our government, and to the letter of the constitution of the state, providing that “in all elections held by the people under this constitution, the person or persons who shall receive the highest number of legal votes, shall be declared elected. (Article IX., § 13.) Whatever may be the proper construction to be put upon the provisions of the Australian bal-

lot law, where the regularity of the nominating certificate is questioned before election, I think that after the election is over, and no question of fraud or illegality of the returns, or other questions of that nature, are raised, the constitution is mandatory, and that the person who receives the highest number of votes must be declared to be elected.

COTTER, APPELLANT, v. COTTER ET AL., RESPONDENTS.

[Submitted April 8, 1895. Decided April 15, 1895.]

16	63
28	15

INJUNCTION—*Discretion in granting or refusing.*—The granting or refusing of an injunction is a matter of discretion in the court, dependent upon the facts of the particular case. (*Blue Bird Mining Co. v. Murray*, 9 Mont. 468; *Klein v. Davis*, 11 Mont. 155, cited.)

SAME—*Dissolution of temporary injunction.*—In an action for an accounting, and for the cancellation of certain deeds to real estate, the plaintiff also asked for a temporary injunction, which the court issued on the filing of the complaint. One of the defendants filed an answer denying all the allegations of the complaint, and alleging that the plaintiff had no interest in any of the property mentioned therein. The other defendants demurred to the complaint, and the plaintiff filed no replication to the new and affirmative matter set up in the answer. Upon the hearing of a motion to dissolve the temporary injunction, the court had before it the complaint and answer, both verified. *Held*, there was no abuse of discretion on the part of the court in ordering a dissolution of the temporary injunction.

RECEIVER—*Nonappealable order.*—An order of the court refusing to appoint a receiver is not appealable. (*Watson v. Davis*, 1 Mont. 98; *Stebbins v. Savage*, 5 Mont. 253, cited.)

Appeal from Second Judicial District, Silver Bow County.

ACTION for an accounting. Judgment was rendered for the defendant below by SPEER, J. Affirmed.

Waldron & Campbell and Shropshire & Burleigh, for Appellant.

PEMBERTON, C. J.—This is an action for an accounting, and for the cancellation of certain deeds to real estate. The plaintiff also asks for an injunction restraining the defendants from transferring or disposing of the property mentioned in the complaint, and for the appointment of a receiver *pendente lite*.

On the filing of the complaint the court issued a temporary restraining order. The defendant Julia Cotter filed her answer, denying all the allegations of the complaint, and containing affirmative allegations showing plaintiff had no interest in any of the property mentioned in the complaint. The Laytons demurred to the complaint. Plaintiff filed no replication to the new and affirmative matter contained in the answer of Julia Cotter.

Upon a hearing to show cause why a receiver should not be appointed, and upon a motion to dissolve the temporary restraining order which had been issued in the cause, the court refused to appoint a receiver, and dissolved said temporary restraining order. From this action of the court the plaintiff appeals.

The order of the court refusing to appoint a receiver is not appealable. (Code Civ. Proc. § 444; *Wilson v. Davis*, 1 Mont. 98; *Stebbins v. Savage*, 5 Mont. 253.)

There were no affidavits filed or proofs taken in support of the application for an injunction. In refusing to issue an injunction, or ordering the dissolution of the temporary restraining order, the court had before it the complaint and answer, both verified. Acting upon these pleadings alone, which were doubtless treated as the affidavits of the respective parties, we are unable to discover any abuse of discretion on the part of the court in the action complained of in this particular. The granting or refusing of an injunction is a matter of discretion in the court, dependent upon the facts of the case. (See *Blue Bird Mining Co. v. Murray*, 9 Mont. 468 and cases cited; *Klein v. Davis*, 11 Mont. 155.)

There being no error shown in the action of the court below, the judgment is affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

HELENA STEAM-HEATING AND SUPPLY COMPANY,
RESPONDENT v. WELLS, ET AL., APPELLANTS.

[Submitted April 10, 1895. Decided April 15, 1895.]

16	65
18	598
19	458
16	65
124	71
16	65
30	561

MECHANIC'S LIEN.—*Delivery of materials under one contract—Foreclosure.*—An action against a property owner and a contractor was brought to enforce a mechanic's lien for material furnished the latter under a certain agreement, in which action the jury returned special findings of fact as follows: 1. The contractor was to notify the plaintiff into which particular contract he was to put the material sold at any particular time; 2. The contractor had the right, under the contract, to furnish the material himself, or buy it elsewhere than from the plaintiff; 5. That each day's order made by the contractor on the plaintiff was due when the material was delivered; 6. That each day's order made by the contractor upon the plaintiff was not a separate and independent contract from the orders made upon every other day; 7. That the plaintiff furnished the material without any specific agreement as to the amount which was to be furnished; 8. That there was an understanding that the material should be furnished by the plaintiff whenever required; and 9. That there was a running account between the contractor and the plaintiff under which the orders were filled. *Held*, that the delivery of the materials was under one contract, regardless of the fact that they were delivered upon different days, and that the delivery dated from the day of the last item delivered.

SAME—Same.—Whether the materials in such cases were delivered under an entire contract or under separate ones, and whether there was a running account between the parties under which the orders were filled, are questions of fact for the jury.

SAME—Same.—Where materials are delivered under separate and distinct contracts, the lien of the mechanic should be filed within the time prescribed by the statute after the delivery under each of such contracts. But when the question has been submitted to a jury, and they find that the materials were delivered under one entire contract, and not under separate ones, and the court adopts such finding, and renders judgment in accordance therewith, it must be presumed that such question was properly submitted, that there was sufficient evidence to support such finding, and that the judgment is supported thereby.

LIENS—Foreclosure—Attorney's fee as costs.—A statute taxing a reasonable attorney's fee as costs to the defendant against whose property a lien is filed, where judgment is rendered for the plaintiff in foreclosure, is constitutional. (*Wortman v. Kleinschmidt*, 12 Mont. 316, followed. *DE WITT*, J., dissenting.)

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for foreclosure of mechanic's lien. Judgment was rendered for the plaintiff below by HUNT, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action to foreclose a mechanic's lien. The issues were tried with a jury. Special findings of fact were submitted and made by the jury, and a general verdict for plaintiff returned.

The findings of fact submitted to and returned by the jury are as follows:

“(1) Was there a general arrangement between O'Brien and the plaintiff by which O'Brien was to notify the plaintiff into which particular contract he was to put the material sold at any particular time? Answer. Yes. William A. Chessman, Foreman.

(2) Did O'Brien have the right, under the contract, to furnish the material himself, or buy it elsewhere than from the plaintiff? Answer. Yes; to buy wherever he pleased. William A. Chessman, Foreman.”

(5) Was each day's order made by O'Brien on the plaintiff due when the material ordered was delivered? Answer. Yes. William A. Chessman, Foreman.

(6) Was each day's order made by O'Brien upon the plaintiff a separate and independent contract from the orders made upon every other day? Answer. No. William A. Chessman, Foreman.

(7) Do you find that the plaintiff furnished the material without or with any specific agreement as to the amount to be furnished to O'Brien for the Wells plant? Answer. No specific agreement. William A. Chessman, Foreman.

(8) Do you find that there was an understanding from the commencement that the work should be done or the material furnished by plaintiff whenever required? Answer. Whenever required. William A. Chessman, Foreman.

(9) Do you find that there was a running account between O'Brien and the plaintiff under which the orders were filled, or do you find they were filled under separate, independent contracts governing each other. Answer. Filled under running account. William A. Chessman, Foreman.

(10) Do you find that all the material charged went into the furnace plant? Answer. All but three valves. William A. Chessman, Foreman.”

The court adopted the findings of fact by the jury, and rendered judgment in favor of the plaintiff for the amount of

the verdict, and for \$100 as attorney's fee, and costs. The defendants appeal from the judgment.

McConnell, Clayberg & Gunn and *O. W. McConnell*, for Appellants.

Walsh & Newman, for Respondent.

PEMBERTON, C. J.—The evidence upon which the findings were made is not before this court. There is no contention that the evidence did not warrant the findings. The appellants contend that, under the findings of the jury, the court erred in rendering judgment for the plaintiff in the sum of five hundred and eighty-two dollars and seventy-seven cents, and for one hundred dollars attorney's fee, with costs of suit. It is contended by appellants that only one item of the materials for which a lien is claimed, amounting to twenty-four cents, was sold and delivered by plaintiff within 45 days before the filing of the notice of lien, and that all the other materials in suit were sold and delivered under separate orders or contracts, and were all delivered more than 45 days before filing the lien, and that such several orders did not constitute one continuing contract. The appellants contend that the findings of the jury numbered 2, 5, 7 and 8 establish the claim that the materials were furnished under separate orders or contracts. We think finding No. 2, while it is to the effect that O'Brien might furnish the materials himself, or procure them elsewhere than of plaintiff, does not in any wise tend to show that what materials he did procure from plaintiff were not furnished under a continuing contract or understanding. Finding No. 5 is to the effect that each day's orders for material were due on delivery. We think that this merely means that there was no specific agreement for time. This does not preclude the presumption that time or credit was understood to be intended by the parties from the nature of the contract, and the custom of dealing between the parties. Finding No. 7 is to the effect that there was no specific agreement between O'Brien and plaintiff as to

the amount of material to be furnished. This finding in no way removes or tends to remove the presumption that whatever was furnished, regardless of amount, should be considered as delivered under a continuing contract or agreement. Finding No. 8 is to the effect that there was an understanding from the commencement between plaintiff and O'Brien that the work should be done or the material furnished from time to time, as required by the nature and necessities of the job O'Brien was engaged in performing. This finding, instead of supporting the theory of appellants, we think, supports the idea that the understanding between plaintiff and O'Brien was that the materials were to be furnished as needed, in the completion of O'Brien's job, and charged in one account, to be settled for when all the material necessary had been furnished. If this were the understanding, it would make the delivery of the materials one contract, regardless of the fact that they were delivered upon different days. (Jones on Liens, § 1435.)

Appellants contend that findings Nos. 6 and 9 were conclusions of law, and should not have been submitted to the jury. We do not think so. They were questions of fact, and were properly submitted. (See Phil. Mech. Liens, § 326, and authorities cited; Jones on Liens, § 1449, and authorities cited; *Turner v. Wentworth*, 119 Mass. 459.) Some of the authorities hold it to be error to refuse to submit the question to the jury whether the materials in such cases were delivered under an entire contract or under separate ones. (Phillip on Mech. Liens, § 326.)

We think the proper rule to be, and the one supported by ample authority, that when all the items in the account relate to one transaction, and is between the same parties, it constitutes a continuous account, regardless of different times of delivery, and dates from the day of the last item. (See Phillip on Mech. Liens, §§ 225, 226; *Lamb v. Hanneman*, 40 Iowa 41; *Kearney v. Wurdeman*, 33 Mo. App. 447; Jones on Liens, § 1435.)

When it is inferable from the evidence that the materials

were furnished under one contract, a mechanic's lien is enforceable for all the items of the account. (*Fulton Iron Works v. North Cedar Creek Mining & Smelting Co.*, 80 Mo. 265.)

We are aware that the authorities hold that, where materials are delivered under separate and distinct contracts, the lien should be filed within the time prescribed by the statute after the delivery under each of such contracts. But when the question has been submitted to a jury, and they find that the materials were delivered under one entire contract, and not under separate ones, and the court adopts such finding, and renders judgment in accordance therewith, we must presume that such question was properly submitted, that there was sufficient evidence to support such finding, and that the judgment is supported thereby.

The appellants contend that judgment should not have been rendered in any event for one hundred dollars as attorney's fee, because he says the law of the state which gives to the court power to enter judgment for attorney's fees, as costs, in cases like the one at bar, is unconstitutional. This question was ably presented to this court in *Wortman v. Kleinschmidt*, 12 Mont. 316, upon the same authorities now cited by counsel in their briefs. The majority of the court, in an able and learned opinion by Mr. Chief Justice Blake, held the law in question to be constitutional. The authorities cited are not uniform or harmonious. There is a conflict between able authorities on the question. In addition to *Wortman v. Kleinschmidt*, *supra*, see *Gulf, etc., Railroad Co. v. Ellis* (Tex. Sup.) 18 S. W. 723.

Without expressing any opinion as to how the court would view the question were it a new one in this jurisdiction, we are of opinion that the question should be regarded as *stare decisis*. The judgment is affirmed.

Affirmed.

DE WITT, J. (*concurring except as to the matter of attorney's fees.*)—I concur in the judgment pronounced in this case in all respects, except as to the allowance of attorney's fees.

I regret that I am not able to discover any reason why I should depart from the views which I expressed upon that subject in *Wortman v. Kleinschmidt*, 12 Mont. 316.

HUNT, J.—Having presided at the trial of this case as judge of the district court, I take no part in the foregoing decision, except to concur in the conclusion of the Chief Justice, affirming the case of *Wortman v. Kleinschmidt*, 12 Mont. 330, sustaining the constitutionality of the statute taxing a reasonable attorney's fee as costs to the defendant against whose property a lien is filed, where judgment is rendered for the plaintiff in foreclosure.

18	70
80	334

GRACE METHODIST EPISCOPAL CHURCH, RESPOND-
ENT, v. RICKARDS, APPELLANT.

[Submitted April 9, 1895. Decided April 22, 1895.]

APPEAL—*Setting aside verdict*.—A verdict of the jury, concurred in by the court, will not be disturbed on appeal, unless it clearly appears that there was no evidence at all to sustain the verdict.

NEGOTIABLE PAPER—*Bona fide holder*.—In an action on a promissory note, it appeared that the note in suit was indorsed to the plaintiff, a church society, before maturity, and without notice of any defense thereto, the consideration of the transfer being the surrender of the indorser's individual note, which he had previously executed to the plaintiff as a subscription to aid in the erection of a new church building. *Held*, that the legal attitude of the plaintiff was simply that of any *bona fide* holder of commercial paper who acquired it before maturity, and in the usual course of business, without notice of anything impeaching its validity, and a recovery could be had against the maker of the note.

Appeal from Second Judicial District, Silver Bow County.

ACTION on a promissory note. Judgment was rendered for the plaintiff below by McHATTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Suit upon promissory note made by John E. Rickards, defendant, on February 26, 1884, to the order of the Continental Oil & Transportation Company. The note was due January

1, 1890. The Continental Oil & Transportation Company indorsed the note to Samuel Theodore. Theodore indorsed it, without recourse, to Isaac E. Blake, who indorsed it, without recourse, to J. L. Culin, secretary, and Culin indorsed it to the plaintiff.

The defendant answered that the several transfers of the note were made without consideration, and that the church holds the note as a gift from Blake, and that the note was transferred to prevent Rickards from pleading any defense he might have as against the Continental Oil & Transportation Company, original payees. Defendant further says that the note was executed by him to the Continental Oil & Transportation Company for the purchase price of certain goods, and the good will of the Continental Oil & Transportation Company in its business at Butte and other Montana cities, but that the individuals, members of the Continental Oil & Transportation Company, after the sale to Rickards, and with the intention of escaping or of evading the obligations of the Continental Oil & Transportation Company, formed another corporation, called the Continental Oil Company, and about March, 1885, did business in Butte, in violation of the understanding between Rickards and the Continental Oil & Transportation Company, and solicited business from the customers of defendant, and by cutting prices and inducing customers to quit dealing with defendant ruined defendant's business, and damaged him in the sum of ten thousand dollars.

Plaintiff's replication denied all the new matter of the answer. The case was tried to a jury, and a verdict rendered for plaintiff. A motion for new trial was made, and overruled. Defendant appeals.

Forbis & Forbis, for Appellant.

Stephen De Wolfe, for Respondent.

HUNT, J.—In order to make plain the application of the legal principles which must govern in the determination of this

case, it is proper to set forth the substantial facts as they appear in the record.

On February 26, 1884, the defendant was an agent of the Continental Oil & Transportation Company, a corporation in the oil business in Butte, Mont. The defendant, after negotiating with one Blake, president of the corporation, in San Francisco, in February, 1884, purchased of the Continental Oil & Transportation Company their business at Butte and Dillon, Mont. The consideration was \$16,000, evidenced by several promissory notes. One of these notes, for \$3,000, is the subject of this action. The notes were all made to the order of the Continental Oil & Transportation Company. That corporation, by its president, Blake, duly executed to the defendant a bill of sale, conveying all the property, real and personal, held by the corporation in the territory of Montana, and including likewise the good will of said company in all its business and patronage in said territory. In the spring of 1885, another corporation, the Continental Oil Company, with the said Blake as its president, commenced to do an oil business at Butte. They competed with the defendant in his oil business, and, it would appear, competed successfully.

Blake, for the plaintiff, in the more important parts of his testimony, said: "Mr. Culin was the secretary of the church, the plaintiff corporation. I indorsed that note to Mr. Culin. I purchased it of the company; Mr. Theodore, to whom it was first sold, stating that he believed he could use it. It was first sold to Mr. Theodore, and afterwards he didn't wish to retain it, and wanted to return it, and I said to the company that I would purchase it. I indorsed this note to J. L. Culin, secretary, on behalf of the church. The consideration from the church to me for this note, was this: I attended the Grace M. E. church at San Francisco. During that year the question was discussed of building a new church. I was asked what contribution I would make. I said to the trustees that if the money would be applied to the purchase of a pipe organ I would subscribe three thousand dollars, * * * * on

condition that they would give me plenty of time for the payment of it, * * * and we agreed that for that subscription I should give my note for five years, and I placed with them collateral security; * * * and the note bore interest at six per cent., due October 1, 1891." "The church people afterwards wanted the interest on their money. I told them that I owned the Rickards note for three thousand dollars, interest at eight per cent., due nearly two years before my paper; that I believed Mr. Rickards was an honorable man, and I would exchange the Rickards note for three thousand dollars, bearing eight per cent., for my own note to the church, and the collateral. The church people accepted. The Rickards note was transferred to Culin for the church, in September, 1887." Witness had heard from one Patterson, who was connected with the company, of Patterson's impressions that Mr. Rickards might attempt to evade the payment of the note. "Afterwards I talked with Mr. Rickards, about 1886 or 1887, and told him of Patterson's belief or impression. He disclaimed that he had ever made any statement to Patterson to the effect that he would not pay the note. Aside from that, I had no knowledge that Mr. Rickards did not intend to pay. These incidents occurred before I purchased the note. Mr. Rickards had never made any such claim as that. There was no defense to this note, so I could not inform Mr. Culin or the church that he did claim a defense. When I talked with Mr. Rickards, he disclaimed that he had ever made any statements to Patterson of that kind. I was then the owner of the note."

On cross-examination he testified: "There was no agreement, outside of the written agreement, that we would not establish a business in competition with Rickards." At the time of the transfer of the note to witness he was president of the Continental Oil & Transportation Company, and paid the company full value for the note. At the time of the transfer witness did not know that Rickards was disputing its legality. "Mr. Patterson was here (in Butte) and he said that it was

his impression that Rickards would attempt to evade the payment of some of those notes. At that time (1886) the Continental Oil Company had established a business in Butte, but they were working friendly with Rickards at that time. At that time, too, Mr. Rickards was buying his goods of the Continental Oil Company. * * *. In 1887 we were in open competition with him. At that time this note was transferred. The relations between Rickards and the company were friendly in 1887. Patterson came up, and afterwards reported to me that he believed Rickards would not pay the note,—I believe some time in 1886. The Continental Oil Company was in business at that time in Butte. * * *. The starting of the new business occurred this way: The company, to avoid the large credits given to Rickards, proposed to establish a warehouse in Butte, to retain the goods, and thus reduce the credit, and Rickards could get the goods as he required them. Rickards was buying his goods from the Continental Oil Company,—the new company,—and was representing them as their agent, very much as he had represented the previous company, with no agreement that they should not sell here, but with an outside understanding that when a person is an agent he shall have the exclusive sale. Soon thereafter Rickards ceased purchasing from the company, whereupon the company sold to anybody.” The witness Blake was president of the new company, and said that he believed that, even if the old company had no right to compete with the defendant under the terms of the sale to Rickards, yet he believed the new company, which was an entirely different institution, would have a perfect right to do business as it pleased. The control of the new business was different from the old, there being only one person (witness himself) connected with the two companies. The new company sold oil to the defendant, but when the defendant did not buy exclusively from the new company it entered the field against him. The witness owned thirty-one and three-tenths per cent. of the stock of the Continental Oil Company, the rest being held by the Standard Oil Company, who

had no interest in the old company. In 1885 one E. R. Barton was an employe of the Continental Oil Company, but had no special authority, except to do such things as he was especially directed to do. The Continental Oil & Transportation Company was never disorganized. The Continental Oil Company was not organized as a consolidation of the Continental Oil & Transportation Company and the Standard Oil Company. The old company continued its business, but sold to the new company its business in certain localities, but Montana was not mentioned as part of the sale, or part of the consideration. When the new company was formed it was understood that business interests would require the old company to retire from the place where the new company intended to do business, but there was no agreement that it should do so. "In using the words, 'matters of consolidation,' in addressing Mr. Rickards in February, 1885, I didn't mean a legal consolidation. I meant that they were getting the stock and offices of the Continental Oil Company and the Continental Oil & Transportation Company into one building. This note in question here was charged to my account with the Continental Oil & Transportation Company. I have paid up my account now. * * * * The church and I have no understanding that I am to pay the amount of this note if this suit is not successful. * * * * I didn't give this note to the church as security. I transferred it to them as an absolute sale. * * * * Neither I nor the Continental Oil & Transportation Company have any interest whatever in the result of this suit. * * * * The Continental Oil Company was organized in December, 1884, at Council Bluffs, Iowa. * * * * In the organization of the Continental Oil Company there was never any consideration paid by the incorporators themselves, or by the shareholders in that company, with regard to these notes, or any indebtedness of Rickards to the Continental Oil & Transportation Company. The object of the formation of the Continental Oil Company was to do a general oil business, and particularly to avoid competition with the Standard Oil Company. It was to protect Mr. Rickards' interests here, as

well as anything else; because the Standard would have advanced into his country, and made his business unprofitable, if he had not purchased his goods from them. There was no connection between the organization of the Continental Oil & Transportation Company and the Continental Oil Company, except a sale to the Continental Oil Company of the old company's plant and stock. It kept all its other property, except this plant and stock, in Colorado, New Mexico, Utah and Wyoming, leaving out Montana, in which it had nothing to sell. Barton never had any interest in the Continental Oil Company." The witness then detailed the stockholders of the new and old companies. But, as we regard the case, it is not important to set forth all that he said in relation thereto.

The defendant gave the history of the purchase by him, as hereinbefore given, saying that he had conducted the business until he was driven out. He continued: "There was no positive agreement between me and the Continental Oil & Transportation Company that I was to purchase from them exclusively. I bought all the goods I could from them, and from the new company, as long as I could have my trade supplied. When the Continental Oil Company established itself in Butte, it commenced a retail business, solicited trade from my customers, and offered them oil at much below the market price. * * * * This continued until I was compelled to sell to them. Prior to this time my business was very prosperous. I was making money. * * * * After the Continental Oil Company established themselves here, my business was very unprofitable. The Continental Oil Company have continued in business here ever since." Witness identified letters from Blake and Barton. "In 1884, Mr. Blake was in Butte, and said to me, 'Mr. Patterson tells me that you say that you will refuse to pay those notes.' I simply replied, 'Mr. Patterson put those words into my mouth.' Patterson came out as an officer of the Continental Oil Company. He came to my office, and said they were about to establish a business here. I showed Patterson the bill of sale, and, after reading it, he passed it back to me, saying I was a fool to pay a dollar of

these notes I gave to Mr. Blake by virtue of this contract or bill of sale. I replied, 'I never will.''' When cross-examined, the witness testified that he bought oil from the Continental Oil Company after they established a business in Butte, and that he sold out to the Continental Oil Company the buildings and plant that the Continental Oil & Transportation Company had sold to him, for which these notes were given in consideration. "I was obliged to sell to them. I got from the new company more than I had paid for it to the old company, but there was a great deal of property added to it."

The correspondence referred to in the testimony of the witnesses was certain letters written by Isaac E. Blake, recognizing that perhaps under the old agreement between the Continental Oil & Transportation Company and the defendant, Rickards, the Continental Oil Company were not to compete with the defendant, but justifying their competition upon the ground that the new company was not the old, and that the defendant had purchased oil from other parties. Two or three of the letters were signed by E. R. Barton as manager of the Continental Oil Company. They were addressed to the defendant, and told him that the Continental Oil Company would establish a regular agency at Helena, in which case the Standard Oil Company would withdraw entirely from Montana, and informed the defendant that the Continental Oil & Transportation Company and the Standard Oil Company were consolidated under the name of the Continental Oil Company. One of the letters, dated February 10, 1885, written by Isaac E. Blake to the defendant, stated that the writer had a general impression in regard to the understanding between defendant and the Continental Oil & Transportation Company that they did not intend to sell any goods in Montana, except to defendant, and assuring defendant that the Continental Oil & Transportation Company would do all in their power to help defendant to succeed.

The principal ground upon which appellant asks for a reversal of the case is insufficiency of the evidence to support the

verdict of the jury. But after a close examination of the record we are constrained to hold that, if the testimony of the witness Blake was credible, there is ample evidence to prove that there was a consideration for the transfer of the note sued on from Blake to the plaintiff church. The exchange of the notes, and the history of the facts which led up to the transaction whereby Blake gave to the church the note of Rickards, which was due before his own note was, is plausible, probable and uncontradicted. Moreover, it was, in the eye of the law, a proper transaction. The paper was a negotiable note, indorsed to the plaintiff before maturity for a valuable consideration, and the plaintiff church, under the evidence, never had the slightest intimation; at the time the note was transferred to it by Blake, or prior thereto, that there was any defense whatever to be made to its payment. It may be that appellant's necessary premise is well founded,—that Blake was a knave; but, assuming that he was, the last act that he would have done, it occurs to us, would have been to inform the victims of his knavery concerning the facts and circumstances which would at once have precluded them from being victimized by him. But we think it is altogether incredible that the secretary of a corporation, even though it be an ecclesiastical organization, should be so wholly guileless as to deliberately accept an unsecured promissory note, with the full knowledge of the fact that the maker would refuse to pay it, and that its collection could only be enforced by legal proceedings, in exchange for one already held by the corporation, and well secured by collateral. The only rational explanation for the exchange is in harmony with Blake's testimony, namely, that the church wanted money, and that they were induced to act in the matter by the more tempting rate of interest which appellant's note bore, and by the fact that it matured before Blake's paper did, and might be more speedily collected.

The pecuniary value of the note in suit, and the responsibility of Mr. Rickards, the maker, were never carefully investigated or questioned. Mr. Blake assured the secretary of

the church that Mr. Rickards was a man of honorable character, which of course carried with it, when sold to an innocent purchaser, without further explanation, an implied assurance that the note would be paid when it matured, provided, of course, the maker was able to meet it. This statement concerning the maker doubtless carried great weight with it, when it is remembered that it was made to the church by one of its prominent members, whose veracity there was no reason to suspect, and whose munificence was most distinguished by his liberal gift. Moreover, they were led to believe by Mr. Blake that he considered the appellant's note good, and that, if their financial exigencies required a speedy relief, it was best for them to accept the Rickards note, which would be paid earlier than his own. It is evident, and the presumption is, that the secretary of the church corporation and Blake acted intelligently with one another, even though the church may have been too trustful in Blake; and our views concerning the whole transaction but conform to the just and fair deductions from the testimony. We regard the circumstance that the church did not inquire of appellant concerning this note as a bit of evidence strongly tending to show their reliance upon the assurance of their friend Blake, and their entire innocence in the acquisition of appellant's obligation. And no matter how similar may have been the traits of character which Blake developed to the traditional Mephistopheles, to whom appellant's counsel has compared him, the all-important fact stands out in bold relief that this plaintiff is not shown to be, directly or indirectly, a party to any misconduct or collusion or fraud of any kind whatsoever. Their legal attitude is, therefore, simply that of any bona fide holder of commercial paper who acquired the same before maturity, and in the usual course of business, without notice of anything which impeaches its validity. Thus they are brought within the elementary rules of law which enable them to recover as against the maker of the note, even though as between him and the original payee equities existed which could have been availed of. (*Brooklyn, etc., Railroad Co. v. National Bank*, 102 U. S. 14.)

The jury saw and heard Blake testify. They had the great advantage of observing his presence; his manner upon the witness stand; his honesty or dishonesty of countenance, his method of speech,—whether he hesitated or was glib of tongue, or nervous or collected; and finally they could impartially and calmly say, after deliberating upon his testimony, whether or not it was truthful or untruthful. With no interest in the result of the trial, and with due regard for the responsibility of their duties as the exclusive judges of the credibility of the witnesses, they have decided that Blake told the truth. The learned judge of the district court also had the advantage of seeing and hearing Blake upon the trial, and after due deliberation he concurred with the jury in believing that the plaintiff had made out its case, and was in good faith the holder and owner of the note in suit.

When we consider these matters, this court, by the authority of an unbroken line of precedents, which have guided its decisions pertaining to the weight to be given to verdicts for upwards of a quarter of a century, and which are contained in nearly every volume of reports that has been published, cannot now disturb the verdict of the jury and the judgment of the lower court.

The attempt to prove that the Continental Oil & Transportation Company and the Continental Oil Company were one and the same thing was a failure. It is true that the witness Blake was interested in both, but it clearly appeared that he was the only stockholder in the Continental Oil & Transportation Company who participated in or owned stock in the new company. The old company seems to have been swallowed up by the Standard Oil Company, or its shareholders. The new company was organized on a different basis from the old, had a different name, and was owned by different parties. It had a perfect right to enter into business anywhere it pleased, and could not at law be precluded from doing so by virtue of any arrangement entered into between the appellant and another different corporation, made some eighteen months before. The

evidence fails to show that Blake was guided by a sinister motive in promoting the new corporation into existence. But, whatever motive he had, it becomes quite immaterial in the face of the fact that he did not control the stock in the new organization, and could not, even had he desired to do so, have used it for the purpose of defeating the collection of the note involved in this suit, unless by sanction or authority of the trustees of the new corporation, who were in no way interested in the Continental Oil & Transportation Company, the payee of the note, or in the note itself, or in this suit.

Other errors are assigned, but, as what we have said disposes of the case, they need not be considered at length. Taking the instructions as a whole, we think they fairly state the law pertinent to the case. Nor do we think there was any mistake in excluding certain letters written by Barton to appellant. The two corporations being clearly legally distinct, any letter of the Continental Oil Company was immaterial and irrelevant to the issues of the pleadings.

The judgment must be affirmed.

Affirmed.

PEMBERTON, C. J., concurs.

FELTON, RESPONDENT, v. WEST IRON MOUNTAIN
MINING COMPANY, APPELLANT.

16	81
18	16
18	16
18	18

[Submitted April 11, 1896. Decided April 22, 1896.]

CONTRACTS—Corporations—Liability to officers for services.—The fact that plaintiff, the secretary and a trustee of a corporation, had never been appointed superintendent and his compensation fixed as required by the by-laws, will not prevent his recovering upon an implied contract for services rendered the corporation which were clearly outside of his ordinary duties and were performed under circumstances clearly raising the presumption that he and the corporate officers understood that they were to be paid for.

APPEAL—Conflict in evidence.—Where there is a conflict in the evidence it is the province of the jury to settle the conflict and their determination will not be disturbed on appeal where there is evidence to support it.

Appeal from Fourth Judicial District, Missoula County.

ACTION to recover for services rendered. The case was

tried before C. M. CRUTCHFIELD, Esq., judge *pro tem*, sitting in place of WOODY, J. Plaintiff had judgment below. Affirmed.

Harry D. Moore and M. L. Crouch, for Appellant.

A director is not entitled, in the absence of agreement, to any compensation for services rendered outside his duties as a director. (*Pew v. Gloucester National Bank*, 130 Mass. 391; *Eakins v. American White Bronze Co.*, 75 Mich. 568, 42 N. W. 98; *Gill v. New York Cab Co.*, 48 Hun 524, 1 N. Y. S., 202; *Levisse v. Shreveport City Railway Co.*, 27 La. An., 641.) And when he performs them without some agreement or provision for compensation the presumption, in view of his relation and interest, may properly arise that he performs the service gratuitously. (*Mather v. Eureka Mower Co.*, 118 N. Y. 631, citing *Loan Association v. Stonemetz*, 29 Penn. St. 524; *Smith v. Putnam*, 61 N. H. 632; *Gill v. New York Cab Co.*, 48 Hun 524.) The plaintiff must show, before he can recover, that he was an officer *de jure* of defendant company. It is not sufficient to show that he was an officer *de facto*. (*Waterman v. C. & I. R. R. Co.*, 34 Ill. 268.) The individual members of a corporation cannot, unless authorized, bind the body by express promises. (*Soper v. Buffalo & New York R. R. Co.*, 19 Barb. 310; *Ruby v. Abyssinian Society*, 15 Me. 306; *University v. Williams*, 9 Gill 305;) nor can any corporate engagements be implied from their unsanctioned conduct or declarations. (*Dunn v. St. Andrew's Church*, 14 Johns. 118; *Prop. v. Gordon*, 1 Pickens 259; *Beach on Corporations*, 193.)

PEMBERTON, C. J.—This is an action brought by the plaintiff to recover for labor and services performed as superintendent of the defendant's mines, and for money expended and goods furnished for its use and benefit. The answer denies all the allegations contained in the complaint, as to the indebtedness sued for, and pleads a counterclaim against the plaintiff.

The replication denies the counterclaim. The case was tried with a jury. The jury made special findings, and rendered a general verdict for the plaintiff. Judgment was rendered for the plaintiff. From the judgment, and an order overruling a motion for new trial, this appeal is prosecuted.

The theory of the defense is that the plaintiff was a trustee of the defendant, a corporation, and a large stockholder therein; that he had never been appointed superintendent by the board of trustees, and his compensation fixed, as required by the by-laws of said corporation; that he was trustee and secretary of the company, and was employed by the day at \$3.50 per day for what time he actually worked in the mines, and that the service he seeks compensation for in this action, as superintendent, was rendered by him as trustee, without any contract for pay therefor, either express or implied; that he had been paid all the company owed him on any account whatever. The defendant sets up a counterclaim against the plaintiff for stock of the company which it alleges plaintiff sold, and failed to account for the money obtained thereby.

There were three questions of fact submitted to the jury: First. Did the plaintiff perform the service, expend the money, and furnish the goods, as alleged in the complaint, for the use and benefit of the defendant? Second. Did the plaintiff perform such service outside of his duties as trustee, secretary and stockholder, and under such circumstances as to clearly raise the presumption that he and the trustees understood that he was to be paid therefor? Third. Was the defendant's counterclaim established by the evidence?

These questions of fact were all submitted to the jury, under fair instructions, we think. It is true there was a conflict of evidence upon all these issues. But it was the province of the jury to settle this conflict. They determined the questions in favor of the plaintiff. We think there was sufficient evidence to support the findings.

The defendant contends that the plaintiff could not recover upon an implied contract for services as superintendent, insist-

ing that, to entitle him to recover, he should show that he was employed by the board of trustees, acting in its official capacity. We think the court rightly interpreted the law governing this part of the contention in the following instructions given to the jury: "The jury are instructed that if they find from the evidence that the plaintiff was a trustee of the company at the time the services alleged by him were performed, and that by a by-law of the company the power to fix the compensation of the superintendent was given to the board of trustees, and that no compensation was ever fixed by them, and that the plaintiff had a large pecuniary interest in the management and success of the company, and that when he assumed the duties of the office of superintendent, without some agreement or provision for compensation, the presumption may properly arise that he performed the services gratuitously. In such case there may be presumed to exist a reason, in the fact of the relation and interest he has in the company, to induce him to assume duties and perform services in its behalf not dependent upon compensation, when nothing appears to the contrary."

"The jury are further instructed that if they believe from the evidence that the plaintiff was, during the time he claims to have acted as manager or superintendent of the defendant company, the secretary or trustee of the defendant company, then plaintiff cannot recover compensation for services rendered by himself for defendant company upon an implied contract, unless it be established by a clear preponderance of the evidence—First, that the services were clearly outside his ordinary duties as secretary or trustee; second, that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers, as well as himself, that the services were to be paid for by the defendant company."

We see no reason why a party may not recover of a corporation for such services, under the same circumstances that would permit of a recovery against a partnership or individual.

The defendant also contends that the jury disregarded the instructions of the court, quoted above. There was a conflict of evidence as to the matter covered by the instruction, but we are not authorized by the record to conclude that the jury disregarded it.

The errors assigned pertain principally to questions of the insufficiency of the evidence to warrant the findings of fact. Questions of the weight and sufficiency of evidence, as well as the credibility of the witnesses, are determined by the jury, and in this case we do not feel authorized to disturb their determination, or the judgment rendered in accordance therewith. The judgment is affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

NELSON, RESPONDENT, v. DONOVAN ET AL., APPELLANTS.

16	85
17	453
16	85
19	322

[Submitted April 16, 1895. Decided April 22, 1895.]

SURETIES—Demand—Bond to pay judgment.—A demand is not necessary before bringing action against a judgment debtor and his sureties on a bond given to stay execution and conditioned that the obligor would pay the judgment. (*Lomme v. Sweeney*, 1 Mont. 584; *Hoskins v. White*, 13 Mont. 70; *State v. Biesman*, 12 Mont. 13, cited.)

COSTS—Motion to retax—Res judicata.—Where a motion to retax costs is denied and the judgment is not appealed from, the question of the legality of such costs is *res judicata* in an action on a bond conditioned for the payment of the judgment of which such costs were a part.

Appeal from Eighth Judicial District, Cascade County.

JUDGMENT on the pleadings was rendered for the plaintiff below by BENTON; J. Affirmed.

James Donovan, for Appellants.

Ed. L. Bishop, for Respondent.

DE WITT, J.—Since the decision of the motion in this case (14 Mont. 78, 35 Pac. 227) the case stands upon an appeal

from the judgment. There is nothing before us but the judgment roll. Judgment was rendered in favor of the plaintiff upon the pleadings. If there was an issue in the pleadings, this was error. The appellants contend that there was an issue. The plaintiff sued upon a bond, alleging breach of the conditions of the same. The bond was given by appellants here to stay an execution pending a motion for new trial in the case of James Donovan (one of the defendants and appellants here) against N. P. Nelson (plaintiff and respondent here.) The condition of the bond was that, if the motion for new trial was denied, the obligors would pay the judgment in the case. The bond was executed by Donovan, plaintiff in that case, and by the two other defendants in this case. The motion for new trial in that case was denied. The obligors have not paid the judgment.

It further appears by the complaint in this case that plaintiff demanded from defendants payment of the judgment. This the answer denies. This, however, is not an issue. The demanding of the payment was not a material allegation in the complaint. There need be no demand for the payment of a judgment before bringing action against the judgment debtor and his sureties on the bond. (Brandt on Guaranty and Suretyship, §§ 1, 97, 197, 198; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2; *Lomme v. Sweeney*, 1 Mont. 584; *Hoskins v. White*, 13 Mont. 70, and cases cited; *Pieper v. Peers*, 98 Cal. 42, 32 Pac. 700; *State v. Biesman*, 12 Mont. 13.) In the case of *Pinney v. Hershfield*, 1 Mont. 367, there is a dictum, which is not necessary to the decision of the case, which it is claimed holds the contrary of the view now expressed. That dictum consisted of a quotation from Parsons on Contracts, but by a reference to that author it is found that his language referred to a subject different than that here before us.

Appellants claim that there is another issue in the pleadings, as follows: The judgment in the former case of *Donovan v. Nelson* was in favor of defendant for his costs, taxed in the sum of \$143.70. The defendants in this case set up that these

costs were illegally taxed. But plaintiff Donovan in that case made a motion to retax them, which was denied. No appeal was taken from the judgment in that case for the purpose of reviewing the denial of the motion to retax costs. That matter cannot now be pleaded in defense in this case. It was *res adjudicata* in the former case. (*McCormick v. Hubbell*, 4 Mont. 98.) The judgment herein is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

WHEELER ET AL., APPELLANTS, v. JONES ET AL., RESPONDENTS.

[Submitted April 16, 1895. Decided April 22, 1895.]

CLAIM AND DELIVERY—Verdict.—Under section 277 of the Code of Civil Procedure a failure to find all the facts that should be found by a jury in an action for the recovery of specific personal property does not invalidate the verdict. (*Miles v. Edsall*, 7 Mont. 185, cited.)

SAME—Verdict in alternative—Judgment.—In replevin a judgment may be rendered for the return of the property under a verdict,—"We, the jury, find for the defendants." The failure of the jury to find a verdict in the alternative is not a matter of which the plaintiff can complain, since upon a general verdict in such case an order for the return of the property follows as a matter of course. (*Anderson v. O'Laughlin*, 1 Mont. 81; *Lavell v. Lowry*, 5 Mont. 498, cited.)

Appeal from Eighth Judicial District, Cascade County.

CLAIM AND DELIVERY. Judgment was rendered for the defendants below by BENTON, J. Affirmed.

Donovan & Lyter, for Appellants.

Leslie & Downing, for Respondents.

PEMBERTON, C. J.—This is an action of replevin. Plaintiffs in their complaint state that they are the owners, and entitled to the possession, of a large amount of jewelry, which they allege defendants to be in the wrongful possession of.

All the material allegations of the complaint are denied by the answer. It appears from the record that the sheriff was only able to find in the possession of the defendants a portion of the jewelry claimed by plaintiffs. The articles he did find and take possession of he turned over to the plaintiffs, the defendants failing to give the necessary undertaking to hold possession thereof pending the suit. The case was tried to a jury. The verdict of the jury is as follows: "We, the jury, find for the defendants." This verdict was rendered on the 22d day of March, 1893, at the March term of the district court. On the 23d day of March, 1893, the clerk entered judgment on said verdict in favor of defendants for costs. On the 4th day of April thereafter, and during the March term of the court, on motion of the defendants, without notice to plaintiffs, the court entered a judgment in the case, modifying said judgment entered by the clerk, in effect directing the return of the property which the sheriff had taken from the defendants and delivered to the plaintiffs. On the same day plaintiffs filed a motion to vacate and set aside said amended or modified judgment. This motion, it seems, was permitted to go over, without action thereon by the court, to the July term of the court in said year. On the 19th day of July of said year, and during the regular July term of the court, said motion was heard, and by the court sustained, and said modified judgment was vacated, seemingly because it had been entered without notice. Thereafter notice of motion to modify the clerk's judgment was given, and on the 24th day of July, during said July term of the court, the same was heard, counsel for both parties being present, and by the court sustained, and the same amended judgment was entered which had been vacated by the court. To this action of the court the plaintiffs excepted, and appeal from the modified judgment so rendered.

The appellants contend that the court had no authority, on the verdict rendered, to enter judgment for the return of the property taken by the sheriff from the defendants, and de-

livered to the plaintiffs. The contention of the appellants is that, as the verdict did not find for a return of the property, the court had no authority to render judgment for a return thereof.

Under our statute (section 277, Code Civ. Proc.), a failure to find all the facts that should be found by a jury does not invalidate the verdict. (*Miles v. Edsall*, 7 Mont. 185.)

In *Sumner v. Cook*, 12 Kan. 162, a case involving quite all the facts and circumstances disclosed by this record, and where the verdict was exactly like the one in this case, Mr. Justice Brewer, delivering the opinion of the court, says: Two questions are in this case. The action in the district court was one of replevin. The property had been delivered to the plaintiff. The verdict was for the defendants. The judgment entered was that defendants recover their costs. At the same term, on motion of defendants, the judgment was modified so as to include a return of the property. Upon the verdict the defendants were entitled to such judgment. (*Kayser v. Bauer*, 5 Kan. 202.) A failure of the jury to find the value did not invalidate the verdict or prevent a judgment for the return. (*Marix v. Franke*, 9 Kan. 132.) The court had the power upon motion to modify the judgment. (Code, §§ 568, 569.) The grounds for the modification are not disclosed in the motion nor the record, and we must therefore presume them sufficient. How the error in the judgment happened we are not informed, and must therefore presume it was from a mistake or omission of the clerk, which the court had power to correct by motion. Both parties appeared, and were heard by counsel on the motion. No advantage was therefore taken, and no error is apparent in the ruling."

In *Anderson v. O'Laughlin*, 1 Mont. 81, where there was a general verdict for the defendant, in a case like the one at bar, the court say: "We see no error in the face of the record before us of which appellant has a right to complain. He is not injured by the form of the verdict. The respondent might complain that the jury failed to find, in their verdict, the value

of the property; that he was entitled to a return thereof, and to assess his damages; but the appellant cannot. Upon a general verdict for defendant upon these issues, under our statute, as well as at common law, an order for return and judgment for costs followed as a matter of course." (See, also, *Lavelle v. Lowry*, 5 Mont. 498; *Waldman v. Broder*, 10 Cal. 379; *Campbell v. Jones*, 38 Cal. 507; *Pico v. Pico*, 56 Cal. 453.)

That the verdict was irregular and incomplete, and that the judgment was not in the alternative for the return of the property, or the value thereof, were matters of which the defendants might complain; but we fail to see how the plaintiffs could be injured on account of said irregularities or defects. (Cobbe on Replevin, § 1108, and authorities cited.) We think the judgment should be affirmed; and it is so ordered.

Affirmed.

DE WITT and HUNT, JJ., concur.

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CHAMBERS ET AL., APPELLANTS, v. THE CITY OF BUTTE, RESPONDENT.

[Submitted April 18, 1895. Decided April 22, 1895.]

DEFAULT—Judgment by—Vacation.—Granting a motion to vacate a default against a city is an abuse of discretion where the affidavit filed in support of the motion and to show excusable neglect merely stated that affiant, who was the city attorney at the time of the motion, had an impression from some source that the matter was disposed of and that he was unable to state why the city was allowed to be in default, and it also appeared from the record that the default was taken over five years after the defendant's time for answering had expired and was then suffered to stand for fifteen months without any effort being made to vacate it.

Appeal from Second Judicial District, Silver Bow County.

DEFENDANT's motion to set aside a default and judgment was granted by McHATTON, J. Reversed.

Statement of the case by the justice delivering the opinion.

This is an appeal from the order of the district court granting a motion to open a default. The facts upon which the

motion was granted are as follows: Complaint was filed July 31, 1882. The demurrer of the city of Butte was filed January 12, 1884. On October 3, 1885, the demurrer of the city was withdrawn, and defendant granted until November 15th to answer. On March 4, 1891, no answer of that defendant being filed, its default was entered. On June 18, 1892, the plaintiffs proved up their case against the defendant, the city of Butte, and judgment was entered. The action was in the nature of ejectment. On August 2, 1892, the defendant made a motion to set aside the default and the judgment. The motion was made upon the record, and also upon the affidavit of Mr. John W. Cotter, city attorney of Butte. After stating some formal facts, and also the facts of the record which are above recited, the affidavit continues as follows:

“That, at the time said default was entered, I had no knowledge of the existence of the pendency of the action against the city of Butte until some time during the winter of 1891-92, or the spring of 1892, or later. That, when I first learned of said action, I was informed or received an impression from some source, that the matter as to the said city of Butte had been disposed of, or that it was not to be pressed against the said city, and am unable to state from what source I received the said information or impression. That on or about the 18th day of June, A. D. 1892, the plaintiffs proved up in said action against the defendant, the city of Butte, and others, and that a judgment has been entered in said cause against this defendant and others. That affiant is informed and believes that the city of Butte has a good and valid defense against the said action so far as the said city is concerned, and, if it has an opportunity to defend the same, that it will be able to show a good and meritorious defense. Affiant is unable to state why the said city was allowed to be in default in this matter, as its default was entered before my term of office began, and during the incumbency of my predecessor in said office. Affiant herewith presents a verified answer of the defendant, the city of Butte, to the said action, said answer being verified by Lee

Mantle, mayor of the said city, and asks leave to file the same, and asks that the said default and judgment be set aside, and that the city be allowed to defend the said action.

[Signed]

JOHN W. COTTER."

The default was opened. The plaintiffs appeal.

William Scallon, for Appellants.

John W. Cotter, for Respondent.

DE WITT, J.—It appears that the defendant's answer was due on November 15, 1885. About five years and a half elapsed without any answer being filed. Its default being entered, fifteen months elapsed without any effort to obtain leave to set aside the default, or to file answer when the application was made. We are of opinion that the facts set up do not show any excusable neglect. Seven years elapsed without the defendant's making an attempt to file an answer. It is a matter of which we have knowledge, from the laws of the state, that a municipal corporation like the city of Butte is constantly represented by an attorney. Nothing whatever appears to show why the city did not attempt to ask leave to file an answer. It is simply shown that the gentleman who was the city attorney of Butte, when the application to set aside the judgment and default was made had an impression from some source that the matter was disposed of. He, in his affidavit, says that he was unable to state why the city was allowed to be in default. We are of opinion that the city was utterly and absolutely without excuse, and that there is nothing in the record to show that the lower court exercised a reasonable discretion in setting aside the judgment and the default. (*City of Helena v. Brule*, 15 Mont. 429; *Thomas v. Chambers*, 14 Mont. 423.)

The order setting aside the default is reversed, and the case is remanded, with directions that the judgment against the city of Butte be affirmed.

Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

LAVELL ET AL., RESPONDENTS, v. FROST, ADMINISTRATRIX, APPELLANT.

[Submitted April 15, 1895. Decided April 29, 1895.]

DEATH OF PARTY—Abatement of action or defense.—A defense does not abate by the death of a defendant after the commencement of an action although there had been no service of summons, but survives under section 22 of the Code of Civil Procedure, and may be maintained by his representatives.

STATUTE OF FRAUDS—Promise to pay debt of another—Consideration.—Where a creditor by written order requests his debtor to pay the amount of his debt to a third person, the oral acceptance of such order is not within the statute of frauds as constituting a promise to pay the debt of another. An agreement by such third person not to file a lien upon the debtor's premises would be a good consideration for such acceptance.

EVIDENCE—Oral acceptance of order.—An alleged oral acceptance by defendant's intestate, of an order for four hundred and twenty-eight dollars, drawn by contractors who had constructed his house, being denied, it was error to refuse defendant's offer to prove that, at the time of the alleged acceptance, there was no indebtedness to the contractors other than one hundred and fifty dollars, which had been paid to plaintiffs, that the contractors were building other houses at the time, and that the balance of plaintiff's bill, for which the order was given, was for materials which had been used in part in other buildings, since such facts, if proven, would tend to show that the order had not been accepted.

Appeal from Second Judicial District, Silver Bow County.

ACTION upon an acceptance. Judgment was rendered for plaintiffs below by McHATTON, J. Reversed.

Statement of the case by the justice delivering the opinion.

This is an action upon a bill of exchange, called by the witnesses an "order." It appears that a firm by the name of McGuire & Anderson repaired a house for one James W. Frost, the defendant's intestate. It is claimed by the plaintiffs that McGuire & Anderson owing them for lumber which went into the Frost house, and Frost owing McGuire & Anderson for their services, the latter gave an order upon Frost to pay the plaintiffs \$428, which order Frost accepted. The order was in writing. The acceptance by Frost, if any, was oral. It was claimed by plaintiffs that there had been a payment of \$150 by Frost upon the order. The acceptance of the order by Frost was denied by the defendant, she contending that the

payment of \$150 by her intestate to the Lavells was in full for all that was owing McGuire & Anderson. Frost died after the complaint was filed, and the present defendant, his administratrix, was substituted in his stead. Verdict and judgment were for plaintiffs for \$278,—the balance on the order after deducting the payment of \$150.

F. T. McBride, for Appellant.

John W. Cotter and *Robinson & Stapleton*, for Respondents.

DE WITT, J.—It does not appear whether Frost was served with summons before his death, but the action was commenced before his death. An action is commenced by filing a complaint. (Code of Civil Procedure, § 66.) “An action or defense shall not abate by the death of the party, but shall survive and be maintained by his representatives.” (Id., § 22.) The administratrix of Frost, the present defendant, was substituted, and the action proceeded against her. The plaintiffs presented their claim to the administratrix after the death of James Frost. (Probate Practice Act, § 159.)

Appellant claims that, as the acceptance of the order by Frost was not in writing, it cannot be relied upon by respondents, because it was a promise to answer for the debt, default, or miscarriage of another. (Compiled Statutes, page 652, § 223.) But the acceptance of the order was not the promise to pay the debt of another. As far as Frost’s acceptance was concerned, if there were any, it was simply to pay his own debt, if anything; that is, the debt which he is alleged to have owed to McGuire & Anderson. If he accepted the order, he simply agreed to pay his own debt to those persons, to wit, Lavell Brothers, to whom his creditors, to wit, McGuire & Anderson, requested him to pay such debt.

It was claimed that there was no consideration for the Frost acceptance. The Lavells furnished materials for the Frost house. It appeared in evidence that they threatened to file a

lien upon the real estate. We are of opinion that there was evidence tending to show that the Lavells agreed not to file the lien, in consideration of Frost's accepting the order. It is not contended but this was a good consideration, if it were the fact, and, as remarked, there was evidence tending to show that it was the fact.

So far, as we are of opinion, there was no error in the case. But we now come to the consideration of a point wherein we are of opinion that the court did err. As noted above, the plaintiffs relied wholly upon an oral acceptance of the order by Frost. Their employes testified to such oral acceptance, and payment by Frost of \$150 on the order. The defendants then offered to introduce testimony which may be summarized as follows: They called McGuire, of the firm of McGuire and Anderson, and wished to prove by him the contract between Frost and his firm. Their offer was for the following purpose, and they proposed to prove the following facts, namely: The amount of extras which were put upon the house by McGuire & Anderson, and that Frost's full contract price was \$1,645, and that when the extras were put in the \$150 which was paid to the Lavells was full payment for the extras, and that there was no other indebtedness to McGuire & Anderson, and that the bill of the Lavells for lumber, for which the order was made, was for material used in houses other than Frost's. They offered to prove by this witness that, when Frost paid \$150 to the Lavells, he had fully paid to McGuire & Anderson the whole contract price and the extras. They offered to prove that McGuire & Anderson were building other houses and doing work for other parties at the same time when they were working for Frost. They offered to prove that the material for such other houses and buildings was part of the material which went to make up the balance of the \$428 for which the McGuire & Anderson order was made. They offered to prove that certain items in the bill for which the order was drawn went into certain other specified buildings. To this whole testimony objection was made by the plaintiffs, and sustained by the court.

We are of opinion that, under the circumstances of this case, the testimony was competent. It might have been different if there had been a written acceptance by Frost. But the acceptance relied upon was oral only. The evidence rejected tended to show that, at the time when Frost was alleged to have orally accepted an order for \$428 drawn by McGuire & Anderson, he in fact owed McGuire & Anderson only about \$150. If such were the facts, they certainly tended to show that Frost would not be likely to accept an order for \$428, when he owed only \$150; and, as the whole matter of the acceptance of the order rested in parole only, we think the rejected testimony was competent. This view is further supported by the fact that one of plaintiffs' own witnesses, the person who received the payment of the \$150, testified that Frost said, when he paid it, that he did not know whether he ought to pay it to the Lavells. The court said, in refusing to receive this testimony, "I shall refuse to admit any evidence except that this order was not accepted, or that Frost did not agree to pay it." As remarked above, if Frost's acceptance had been in writing, the situation might have been different; but, it being oral, we think that the testimony offered tended to show just that which the court said it would accept testimony upon, namely, that Frost did not accept the order, or agree to pay it. The offered testimony certainly tended to show that fact.

The judgment is reversed, and the case is remanded for new trial.

Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

BUTTE & BOSTON MINING COMPANY, RESPONDENT, v.
SLOAN, ADMINISTRATRIX, APPELLANT.

[Submitted April 17, 1895. Decided April 29, 1895.]

MINES AND MINING—Ejectment—Lode Claim on placer ground—Conflict in evidence.—

Where, in ejectment to recover mining property, there was clear and substantial evidence to support the findings of the jury that there were no veins or lodes known to exist within the boundaries of plaintiff's placer claim at the time of applications for patents therefor, such findings will not be disturbed because of a conflict in the evidence.

SAME—New trial—Newly discovered evidence.—Where the jury found that no veins or lodes were known to exist upon patented placer ground at the time of application for patent therefor, the discovery, subsequent to the trial, that a lode claim had been located upon the ground in controversy long prior to the applications for patent, and notice thereof recorded, would not justify a new trial upon the ground of newly discovered evidence, since the mere recorded evidence of a claim of discovery could not overcome the finding that no veins or lodes were known to exist.

SAME—Ejectment—Placer patent—Evidence.—In ejectment, where plaintiffs claimed under placer patents, the introduction of the patents in evidence conclusively establishes, as against the defendants, the fact that the ground was placer.

Appeal from Second Judicial District, Silver Bow County.

EJECTMENT to recover mining ground. Defendant's motion for a new trial was denied by McHATTON; J. Affirmed.

Statement of the case by the justice delivering the opinion.

Ejectment for mining ground. Plaintiff claimed the property involved under placer patents. Defendants claimed certain portions of the ground under and by virtue of a quartz location made upon veins which defendants claim were known to exist at the date of the application for the placer patents. The plaintiff denied the existence of any veins, known or unknown, upon the ground. There was a trial to a jury. A general verdict for the plaintiff was rendered, and special issues were returned. By these issues the jury determined that no veins were discovered, or exposed to view, within the boundaries of the mining ground in dispute; that in 1876 there was no discovery in the shaft known as "Discovery Shaft of the Brown Girl Lode Claim;" that, when J. & T. made application for their placer patent, there were no veins or lodes within

the boundaries of the property described in the patent, so exposed that a person seeking information as to whether a vein or lode existed could have seen them, and that neither J. nor T. knew of any lode or vein within the Brown Girl location; that the Brown Girl location, as located by one John Devlin prior to the application of J. & T. for a placer patent, was not so marked in its boundaries upon the ground as to be readily traced; that, at the date of the application for placer patent, no veins claimed by the defendants were known to exist; that J. & T., placer patent applicants, were well acquainted with the ground included in the placer patent, but that none of the veins now claimed by defendants were known to said J. & T. at the time of their application; and that at the date of the application for patents there were no known leads, lodes, or veins upon the ground involved in this suit.

The court entered judgment in favor of the plaintiff. A motion for a new trial was made and overruled. Defendants appeal.

Charles O' Donnell, for Appellant.

Counsel cited: *Morton v. Nebraska*, 89 U. S. 639, 675; *Gwillian v. Donnellan*, 112 U. S. 1110; *Reynolds v. Iron Silver Mining Co.*, 115 U. S., page 601; *Iron Silver Mining Co. v. Reynolds*, 123 U. S. 598; *Noyes v. Mantle*, 123 U. S. 1132; *United States v. Silver Mining Co.*, 128 U. S. 195; *Hammer v. Garfield Mining Co.*, 128 U. S. 548; *Dahl v. Ranheim*, 132 U. S. 260; *Iron Silver Mining Co. v. Campbell*, 10 Sup. Ct. 765; *United States v. Trinidad Coal and Coke Co.*, 11 Sup. Ct. 57, 137 U. S. 160; *Davis v. Wiebold*, 11 Sup. Court 628; *Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 12 Sup. Ct. Rep. 543; *Sullivan v. Iron Silver Mining Co.*, 12 Sup. Ct. Rep. 555.

Forbis & Forbis, for Respondent.

HUNT, J.—The record of the evidence in this case is vo-

luminous, consisting, not alone of the elaborate opinions of many practical miners, of great intelligence and experience, concerning the material issue, but likewise of experts skilled in the technique of the enlightened and comprehensive science of mining engineering.

It plainly appears that the case was exhaustively presented by both sides, and, like many other suits of its important class, we find the transcript embodies numerous and most substantial differences of opinion upon the vital point involved,—whether there were ever any veins, leads or lodes legally existing, and known to exist, within the ground embraced in the placer patent, prior to and at the time applications were made for such patents by Talbot & Jones, original patentees.

It is unnecessary to set forth at length the exact character of the testimony. Briefly stated, witnesses for the defendants swore that there were leads known to exist long prior to the applications for placer patents; that these leads were first seen about 1866 or 1867, and were visible in a water ditch which ran across what was subsequently relocated as the "Brown Girl Claim" in 1884; that the granite was up to the grass roots; that the lead cropped out, and float rock could be traced in an easterly direction from the ditch and from the discovery shaft; that the Brown Girl lode had a wall on the north side. Brown, called by defendants, said he put up a location notice in 1878, but did not record the same, and did not recall the name given to the claim; did not sink a shaft at that time; and did nothing, in fact, then, except to sink fifteen or eighteen inches. In 1884 he located the Brown Girl. Devlin, for defendants, said he had made a discovery of a quartz lode on the ground in 1876, before the Brown Girl discovery, but never recorded it. It was the Cressida. He sunk a hole about three feet deep, and found a wall. On one side were granite and quartz. The discovery shaft was about thirty feet westerly from the Brown Girl, although the location included much of the Brown Girl ground. It was the same lead. That the country about his location was a slide, but there was no slide ground on his particular location.

The plaintiff's witnesses, in rebuttal, said: That the ground involved in suit was a slide, drift, with nothing in place in the ditches referred to by defendants' witnesses. That the rock was not in place in the discovery shaft of the Brown Girl, down to a depth of ten feet. That there is no vein upon the ground, showing in the ditches or excavations. That there were discolorations of the surface material, or slide rock, due to iron. These discolorations cropped out generally, but no croppings of a ledge. The ground was loose, showing oxidized granite, carrying more or less quartz passing through loose material. That the whole hill about the ground in dispute bears evidence of impregnation of iron. That there was no wall in the Brown Girl shaft. That there was no vein in the ditch, but a granite material, stained with red and yellow iron. James Larkin, for plaintiff, said he was working on the Snohomish claim in 1882, when Brown was working on the Brown Girl. At that time the Brown Girl shaft was about four and one-half feet deep. There was nothing like a vein anywhere in that hole then. That the country about there was all decomposed slide rock, and witness sunk on his own claim thirty-five feet before he claimed a discovery and reached solid formation. Another witness, McNamara, corroborated Larkin in his evidence concerning the loose formation of the ground in the vicinity of the Brown Girl location; and in 1881 he looked over the particular ground in controversy, in search of a vein, but could see no vein. Brown's shaft was four or five feet deep about that time.

To these conflicting facts were applied a series of instructions, embracing definitions of lode claims, as approved by the supreme court of the United States and the supreme court of this state, to the effect that, to constitute "veins known to exist," within the meaning of the law, it is not enough that there may have been some indications, by outcroppings on the surface, of the existence of lodes, or veins of rock in place, bearing gold or silver, or other metals. To meet the designation of "veins known to exist," the lodes or veins must be clearly

ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. (*United States v. Iron Silver Mining Co.*, 128 U. S. 673, 9 Sup. Ct. 195; *Brownfield v. Bier*, 15 Mont. 403, 39 Pac. 461; *Iron Silver Mining Co. v. Mike & Starr Gold & Silver Mining Co.*, 143 U. S. 394, 12 Sup. Ct. 543.)

Were there any veins or lodes, and were they veins or lodes known to exist, at the time application was made for the patent? And was this plaintiff, as a purchaser from the patentees, to be deprived of any portion of its claim by legal exception of any vein or lode from the placer patent grant? These were all questions based on facts generally and specially to be answered by the jury, after analyzing the evidence adduced, under proper instructions; and, with unvarying consistency, they found that there were no veins or lodes known to exist at the time of the applications for the placer patents to the ground in question. The evidence to support these findings is clear and substantial. We cannot say the jury erred.

The present case is to be distinguished from *Brownfield v. Bier*, *supra*, referred to in argument. In the trial of that suit, veins were proved to have existed; and the principal and difficult point for decision was, not whether there were veins at all, but whether the veins were "such veins as the decisions hold to be exempt from the placer grant, or such as were known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them." It was held they were not. This contention, however, is simplified by the fact, as found, that there were no veins at all, discovered or known to exist, within the placer-claim boundaries, at the dates of the applications for placer patents. It therefore follows that, where there were no quartz veins discovered or known to exist when the placer claimant made his application for patent, defendants failed to show that they were entitled, as against the patents, to the possession of any pretended lode claims, on the ground that such lode claims were excepted from the patent to Jones and Talbot. (*Brownfield v. Bier*, *supra*.)

Defendants also moved for a new trial upon the ground of

newly-discovered evidence. After the trial was over, one of the defendants, Sloan, discovered that on June 13, 1876, John Devlin had located the Radical claim, upon what was afterwards the Brown Girl location. This location notice was on record, but by oversight, perhaps excusable, under all the circumstances, was not produced at the trial. Appellants now argue that the evidence of the said certified copy of the Radical Lode location will prove that a lead, or lode bearing precious metals, was known to exist on the ground now known as the "Brown Girl Lode Claim," over three years prior to the application of Jones and Talbot for the patent to the ground now known as "Mineral Entry No. 491 and 597." But the question of whether or not Devlin discovered a vein was litigated, and it was found he had not, and no vein existed in his discovery shaft. The essence of the suit was this inquiry, and the fact being found that there were no veins, and that he made no discovery, no recorded evidence of a claim of discovery could legally avail him; or, to be plainer, if no lead existed, no claim of one could overcome the fact of the physical absence of one.

It would be a dangerous precedent to hold that the introduction in evidence of a notice of location of a mining claim would alone justify a reversal of a verdict in a suit where, throughout a long and expensive trial, the existence of any known vein had been the issue on trial between placer and quartz locations, and where it had been decided no veins existed at all in defendants' pretended location at any time prior to the placer claimant's several applications for patent.

The last assignment relied on is that the court erred in sustaining the plaintiff's objection to the following question: "Did you ever know of any placer mining being done on the ground known as the 'Brown Girl Lode Claim' prior to 1889?" The jury having found that Devlin never had had a valid location, and that there was no vein in the claim of Devlin, the question is not now a material one for our consideration. We think, however, that the placer patents which were

issued to Jones and Talbot, and offered in evidence, conclusively established, as against defendants, the fact that the ground was placer. Nor can defendants now avoid the effect of these patents. (*Dahl v. Raunheim*, 132 U. S. 260, 10 Sup. Ct. 74.)

We find no error in the record. The order denying a motion for a new trial, and the judgment, are affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

HOPKINS, APPELLANT, v. THE CITY OF BUTTE, RESPONDENT.

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[Submitted April 18, 1895. Decided April 29, 1895.]

MUNICIPAL TAXES—Payment under protest—Assumpsit.—Assumpsit cannot be maintained to recover money paid to a city for a special assessment for sewer tax, alleged to be illegal, where such payment is made to the city treasurer before the penalty for nonpayment is assessed or due, though plaintiffs stated at the time that it was paid under protest and that suit would be brought to recover it back.

SAME—Same.—Where the inhabitant of a city whose property has been illegally assessed pays the demand with a full knowledge of all the facts which rendered such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention or to prevent its immediate seizure, such payment must be deemed voluntary; and the filing of a written protest at the time of making payment does not make the payment involuntary.

SAME—Same.—The law looks with disfavor upon suits to recover back taxes which are paid under a protest prompted by dissatisfaction and unwillingness to pay, rather than by compulsion to prevent the immediate execution of a levy or seizure.

Appeal from Second Judicial District, Silver Bow County.

ACTION against a city to recover taxes paid. Judgment of nonsuit was rendered for the defendant by McHATTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Plaintiff sues to recover from the defendant \$1,028.50, paid July 28, 1891, by her to the defendant, on a special assessment for sewer tax.

Appellant in her complaint sets up that, when she paid the tax, she protested against the payment, and claimed that the tax was illegally levied and void, and that the payment thereof was compulsory. She pleads that no resolution or ordinance of the city council was ever passed authorizing the building of the sewers for which the property was assessed, and that the special assessment was illegal and void, in that the city of Butte does not possess the power and authority to levy any special assessment for sewer tax upon any property, for the reason that the city has never established, by ordinance or otherwise, any general system of city sewerage, or any sewerage districts in said city, or any portion thereof, which it is required to do before it can levy and collect any special assessment for sewer purposes; and that, if she had not paid the said tax, the pretended assessment would have been certified by the city clerk to the county clerk, who would have added a penalty, and the county treasurer would have sold the land upon which the tax was claimed to be a lien, and, in order to prevent these things, she paid the money.

The answer denies that there was any compulsory payment, as alleged, and avers proceedings had by the city council of Butte, ordering the construction of the sewers for which the special assessment was levied, and sets up that the city of Butte has the authority to levy such special assessments; denies that the property of the plaintiff would have been sold, as alleged, but avers that the plaintiff paid the tax before the same had been advertised as delinquent, and that it was paid without fear or compulsion.

There was a trial to the court. The plaintiff introduced the special assessment notice informing her that there was due from her to the city of Butte \$1,028.50 on a special tax, in accordance with the resolution passed by the city council on the 1st day of July, 1891, and that, unless the tax was paid within the time provided, five per cent. thereof would be added thereto as a penalty for delinquency. The plaintiff testified that when she paid the money to the city treasurer she objected to the payment, and said that she should pay it under

protest, and would further protest the matter afterwards; that she wanted to get away from the city, and was advised to pay it under protest, but that at that time she did not have time to attend to the protest of the matter. The money was paid before the penalty became due; that is, before August 1st. "The treasurer did not tell me that my property was seized, or in his possession, at that time. It was not advertised for sale. I do not know that he said he would sell the property. I paid the tax according to the notice I received about the penalty, and paid it under protest. Mr. Jacobs accepted the money under protest. He made no threats. There were sewers built in front of my property."

Plaintiff introduced an ordinance of the city of Butte for the establishment and maintenance of a sewer system in Butte City. By this ordinance the city was divided into three sewer districts, and authority to construct sewers is expressly assumed, and the real estate to be benefited by the sewers is to be assessed for the purpose of paying for said sewers. The method by which the assessment shall be made is set forth in the ordinance, and the payment of the special tax, if not made before August 1st after the levy, shall be enforced by certifying the resolution of the city council to the county clerk of Silver Bow county, with the certificate of the city treasurer attached, showing what taxes thereby levied remained unpaid; and the county clerk shall put the same, with five per cent. additional, upon the tax roll, in addition to and as part of all other city taxes to be collected, and to be paid to the city treasurer in the same manner as other tax money received by said county treasurer for the benefit of said city.

At the conclusion of plaintiff's testimony, a motion for nonsuit was made, upon two grounds: First, that the evidence shows that the payment of the tax was voluntary, and not under protest, mistake, or threat; second, that the claim, account or demand had never been presented to, and audited and allowed, or disallowed, by the city council of Butte, as required by law. The court sustained this motion, and from the

order sustaining the motion, and the judgment in favor of defendant, the plaintiff appeals.

Corbett & Wellcome, for Appellants.

The rule to be applied to the case at bar, is, that if a person pays an illegal tax in order to prevent the issuing of a warrant of distress with which he is threatened and which will of course issue unless the tax is paid, and the collector understands from the payer that the tax is regarded as illegal and that an action will be brought to recover the amount paid, the payment is deemed compulsory and not voluntary. (*Preston v. Boston*, 29 Mass. 7; *Erskine v. Van Arsdale*, 15 Wall. 75.)

Taxes paid under protest can be recovered back where the tax has been assessed and the time for its correction past, and nothing remains to be done but to issue the warrant for its collection as required by statute. (*Kansas Pacific Railway Company v. Commissioners of Wyandotte County*, 16 Kan. 587; *Grim v. School District*, 57 Penn. 434; *Henry v. Horstick*, 9 Watts. 412.)

John W. Cotter, for Respondent.

Money paid voluntarily to satisfy an illegal tax cannot be recovered back by the party paying the same. (2 Dillon on Mun. Cor., §§ 939, 940, 941, 942; Cooley on Taxation, pages 804; 805, 806, 807, 808, 809, 810, and note.) In order to maintain an action for the recovery of money paid to satisfy an illegal tax, the same must have been paid under fraud, mistake or duress, which will render a payment of the tax involuntary, and such compulsion must in general consist of some actual or threatened exercise of power possessed or believed to be possessed by the party exacting or receiving the payment, over the person or property of the person making the payment. (2 Dillon on Municipal Corporations, §§ 943, 944, 945, 946, 947; *Lamborn v. Commissioners of Dickinson County*, 97 U. S. 187.)

The city treasurer of the City of Butte to whom the said

payment was made did not possess any right or authority to seize or sell the property at the time the payment was made. (Municipal Incorporation Act, § 428.)

The fact that the payment was made under protest verbally or in writing does not render it an involuntary payment that would entitle this plaintiff to recover the money back. (2 Dillon on Municipal Corporations, § 947; Cooley on Taxation, pages 810, 811, 812, 813; *Bank v. Mayor, etc.*, 45 Am. Rep. 476; *R. R. Company v. Commissioners Dodge County*, 98 U. S. 541; *Conklin v. Springfield*, 24 N. E. Rep. 67; *Rogers v. Greenbush*, 4 Am. Rep. 292.) All payments of taxes are supposed to be voluntary until the contrary is made to appear. (Cooley on Taxation, 810; see note to *Erskine v. Van Arsdale*, 82 U. S. 75, 77, 21 L. C. P. Co. 63.) Ignorance or mistake of law will not entitle a party to recover back money paid on an illegal tax. (2 Dillon on Municipal Corporations, 944; *Lamborn v. Commissioners Dickinson County*, 97 U. S. 187.)

HUNT, J.—Several points are raised by the defendant's motion for a nonsuit, but we prefer to confine our opinion to a single question presented,—whether an action of assumpsit can be maintained to recover money paid for taxes upon a special tax assessment, where such payment has been made before the penalty for nonpayment is assessed or due, but where one who has made such payment notified the treasurer of the city, at the time of the payment, that she paid under protest, and that she intended to sue to recover back. We pass upon this question, because, by the record, the appellant is forced into the contention that the payment by her to the city treasurer of Butte was an involuntary one. She does not set forth in her complaint that the penalty had become due upon the taxes levied upon her property, nor that there was any actual seizure, or any urgent or immediate danger of a seizure, of her real estate by the proper authorities, nor that the property was advertised, or about to be advertised, for sale, nor that any act was immediately threatened or about to be done by which she would be deprived of the enjoyment of her real

estate, but relies upon a probability that, in the usual legal course of affairs, if she should become delinquent, the city treasurer of Butte would proceed to make out a delinquent assessment list, and certify the same to the county clerk of Silver Bow county, who would add the penalty prescribed, and certify the same to the treasurer of Silver Bow county, whose duty under the law it would ultimately be to proceed to sell the property for the payment of the taxes due.

The common-law rule which, in the absence of statute, must govern all demands similar to that made by a municipality for taxes of one of its inhabitants whose property has been assessed, is that where a party pays an illegal demand with a full knowledge of all the facts which rendered such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent the immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back; and the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary. (*Railroad Co. v. Commissioners*, 98 U. S. 541; *Little v. Bowers*, 134 U. S. 547, 10 Sup. Ct. 620.) And the test of whether or not money paid for the payment of taxes was a payment under duress, so as to make it an involuntary payment, "must, in general, consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party accepting or receiving the payment, over the person or property of another, from which the latter has no other means, or reasonable means, of immediate relief, except by making payment." (2 Dillon on Municipal Corporations, § 943.) It cannot be successfully argued that Mrs. Hopkins paid the tax which she now seeks to recover for the purpose of immediate relief. Indeed, the contrary appears, for she stated that she wanted to go away from Butte, and, while she thought the tax was unjust and illegal, of her own free will she paid the amount of it, merely stating, in effect, that it was paid under protest, and that she intended to

sue to recover it back. The assessment does not appear to have ever been set aside by any legal proceedings, and it is admitted that the improvements for which the levy was made were built in front of the property assessed. She knew, presumably, that the city treasurer could not sell her property, and could not even do as much as assess the penalty in case the tax was not paid. All these facts clearly show, at law, an unwilling, but none the less voluntary, payment, as contradistinguished from a compulsory payment. Such a payment does not entitle her to the relief she asks. (Cooley on Taxation, § 811; *First National Bank v. Mayor, etc.*, 68 Ga. 120; *Rogers v. Inhabitants of Greenbush*, 58 Me. 392; *Conkling v. City of Springfield* (Ill. Sup.) 24 N. E. 67; *Bowman v. Boyd*, 21 Nev. 281, 30 Pac. 823; *Richardson v. City of Denver*, 17 Col. 398, 30 Pac. 333; *Swift v. City of Poughkeepsie*, 37 N. Y. 511.)

The constitutionality of the law under which the assessments were levied was not assailed. It is only claimed that the city of Butte, by reason of a failure to pass an ordinance dividing the city into sewer districts, had not taken the steps necessary to authorize it to levy any special sewer assessments. There was a resolution and ordinance passed, however, in which sewer districts were created. The ordinances may have been defective, and the assessments even irregularly made, but the general power of the city to make sewer assessments under valid ordinances is not disputed. The case, therefore, is not one where authority to levy the tax was wholly wanting, and must be distinguished from decisions which uphold the right to recover back taxes where the levy of the tax is on its face invalid, and where protest on the ground of illegality was made at the time of payment. (*Shoup v. Willis*, 2 Idaho 108, 6 Pac. 124; *Gillette v. Hartford*, 31 Conn. 351; *Newman v. Supervisors*, 45 N. Y. 676.)

It is also to be distinguished from the opinion of Chief Justice Chase in *Erschine v. Van Arsedale*, 15 Wall. 75, in that payment was made in that case to release property from detention, and the protest against payment (as in other cases involv-

ing the payment of revenues to release property) saved the rights which grew out of that fact, while in the case at bar there was no levy at all, and no right to make a levy was conferred upon the treasurer of the city, to whom payment was made. Nor can *Whitney v. City of Port Huron* (Mich.) 50 N. W. 316, control under the conditions of fact here existing. In that case the plaintiff sued to recover taxes paid by her, under protest, on a special paving assessment. Payment was made under protest, and to protect the property from being sold, and on account of the taxes being illegal. The city treasurer had advertised the plaintiff's property for sale, and she had the right to presume that he would proceed with the sale. The case was thereby brought within the rule of immediate and urgent necessity of paying the tax to prevent seizure. And it was held that a payment made under such a threat was an involuntary one.

Under the great weight of authority and reason, the law looks with disfavor upon suits to recover back taxes where dissatisfaction and unwillingness to pay, rather than compulsion, to prevent the immediate execution of a levy or seizure, are the causes which prompt the protest. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

AUTHIER, RESPONDENT, v. BENNETT BROTHERS COMPANY, APPELLANT.

[Submitted April 12, 1895. Decided April 29, 1895.]

LIBEL—*Reputation of plaintiff*.—In an action for libel, the good reputation of the plaintiff being alleged and denied, the mere fact that there was no evidence contradicting plaintiff's proof of a good reputation would not alone entitle him to a verdict where the defendant denied the publication of the libel and also pleaded justification.

APPEAL—*Statement—Settlement*.—It is the duty of the district judge to require the statement on appeal to be made correct in substance, and orderly and chronological in

form, withholding his settlement until this is done, and not to leave it to the appellate court to decipher from an incongruous mass of material the matter which was before the trial court.

Appeal from Second Judicial District, Silver Bow County.

ACTION for libel. Plaintiff's motion for a new trial was granted by McHATTON, J. Reversed.

Statement of the case by the justice delivering the opinion.

This is an appeal from an order granting a new trial. The action was for libel. The libel declared upon was the alleged false and malicious publication in a merchant's protective association of the following :

"Copyrighted by Andrews and Olds. (Form 1.)

"Report of Delinquent Accounts.

"To R. A. Bell, Agent: The following report of delinquent accounts is this day made to you by article III. of the Merchants' Protective Contract, viz.:

Name of Delinquent Debtor.	Occupation.	Residence.	When Account Closed.	Amount of Delinquent Account.
C. H. Authier.	Butcher.	Helena.	June, 1897.	\$168.65

"By Bennett Brothers Company, Butte."

In the answer the defendant denied the publication as alleged in the complaint, and also pleaded a justification. The case was tried on these pleadings.

Furthermore, the plaintiff set up in his complaint "that, at the time of the commission of the wrongs by the defendant hereinafter mentioned, he (the plaintiff) was, and always had been reputed to be, an honest man, and was so accepted among his neighbors and the inhabitants and business men of the city of Helena and state of Montana and elsewhere."

The defendant, in its answer, denies "that, at the times mentioned in plaintiff's complaint, plaintiff was, or always had been reputed to be, an honest man, or was so accepted among his neighbors or the inhabitants or the business men of the city of Helena or the state of Montana."

The verdict of the jury was for the defendant. Plaintiff's

motion for new trial was granted. From this order defendant appeals.

The specification of error upon which the motion was granted is as follows: "The plaintiff specifies as error that there being absolutely no evidence contradicting the material allegations of plaintiff's complaint, except the witness Kipp, whose testimony was immaterial as showing what took place in Idaho, where plaintiff never lived, and numerous witnesses in Butte, where he did live, testifying to his good character, and it being absolutely essential that the defendant should establish by the preponderance of the evidence that the plaintiff's character was bad as charged in the libel, and substantial damages having been proven by the bare fact of such a false publication without proof of special damages, plaintiff was entitled to a verdict, and is now entitled to a new trial."

F. T. McBride and George Haldorn, for Appellant.

F. E. Stranahan and R. G. Davies, for Respondent.

DE WITT, J.—We are of opinion that, even if the specification of error is true, it is not sufficient upon which to grant a new trial. We may assume, as the specification states, that it was proven, without substantial conflict of testimony, that the plaintiff's character was good; and by the word "character" we suppose counsel means "reputation." There is some difference in the authorities upon the question of proving the plaintiff's general reputation.

It is said in *Odgers on Libel and Slander*: "The plaintiff cannot give evidence of general good character in aggravation of damages merely, unless such character is put in issue on the pleadings, or has been attacked by the cross-examination of the plaintiff's witnesses; for till then the plaintiff's character is presumed good." (Page 310.) "One way, but a very dangerous one, of minimizing the damages, is to show that the plaintiff's previous character was so notoriously bad that it could not be impaired by any fresh accusation, even though

undeserved. The gist of the action is the injury done to the plaintiff's reputation; and, if the plaintiff had no reputation to be injured, surely he cannot be entitled to more than nominal damages. Hence the fact that the plaintiff had a general bad character before the date of the libel or slander may be given in evidence in mitigation of damages." (Page 320.) "There has been a great conflict of opinion as to the admissibility of evidence of the plaintiff's general bad character, and of rumors prejudicial to his reputation; but the law on the point has now been finally settled by the decision in *Scott v. Sampson*, 8 Q. B. Div. 491." (Page 321.) This is an English edition of an English work, and English authorities only are referred to.

In Townsend on Slander and Libel we find the following: "It is a much vexed question whether, in an action for slander or libel, the plaintiff may, in aggravation of the damage he has sustained, introduce evidence of his good reputation prior to the publication complained of." (Page 645.) "The plea of not guilty put in issue the general character [reputation] of the plaintiff, and therefore upon a plea of not guilty, only, the defendant might give in evidence in mitigation the general bad character [reputation] of the plaintiff *before and at the time* of the publication complained of. Certainly, a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence. This principle, so much discussed at an early day, and for a time left unsettled, has since been so well established by authority as not now to be open for discussion;" citing numerous authorities. (Page 669.) "It has been held in some cases that the defendant may, in mitigation of damages, prove that, *prior* to the publication complained of, a general report or suspicion existed that the plaintiff had committed the act charged. The decisions to the contrary are quite numerous." (Page 678.)

In Newell on Defamation, Slander and Libel we find it stated: "Proof of the bad character of the plaintiff at and before the time of the alleged slander is admissible in mitigation

of exemplary as well as compensatory damages." (Page 890. See, also, division 3, page 823, § 1, and cases cited.)

It has been held that if a justification is pleaded, and testimony offered tending to prove it, testimony of plaintiff's reputation is not competent. (*Miles v. Van Horn*, 17 Ind. 245; *Matthews v. Huntley*, 9 N. H. 146; *Severance v. Hilton*, 24 N. H. 147; *Chubb v. Gaell*, 34 Pa. St. 114.) It has also been held that, if justification is pleaded, the plaintiff may show his good reputation in aggravation of damages. (*Harding v. Brooks*, 5 Pick. 244; *Byrket v. Monohon*, 7 Blackf. 83; *Smith v. Lovelace*, 1 Duv. (Ky.) 215; *Downey v. Dillon*, 52 Ind. 442; *Moyer v. Moyer*, 49 Pa. St. 210.) It has also been held that the defendant may show the bad character of plaintiff in mitigation of damages. (*Moyer v. Moyer*, 49 Pa. St. 210.) Upon these points, see, also, the text writers above cited.

It is not necessary in this case for us to determine what view we would take as to pleading or proving the plaintiff's good or bad reputation in aggravation or mitigation of damages. We cite the above authorities simply for the purpose of showing that the question of the plaintiff's reputation has been held to be a circumstance in aggravation or mitigation of damages. But the specification in this case assumes a position which is not sustainable, to wit, that the plaintiff's good reputation is a complete and perfect cause of action, if joined to the averment that the alleged libel was published; that is to say, if an alleged libel is pleaded to have been published against a person of good reputation, the cause of action is complete, and there is no defense. The untenableness of the position is apparent. In the case at bar the defendant denies the publication of the alleged libel as set out in the complaint, and also pleads justification. The case was tried upon these pleadings. No objections were made to them, if any existed. For all that appears by the specification, the defendant made out its defense independent of the reputation of the plaintiff. Therefore the bare fact that plaintiff's reputation was shown to have been good could not alone be a cause for granting a new trial.

The case is remanded, with directions to deny the motion for a new trial, and to enter judgment upon the verdict for defendant for costs.

We cannot leave this case without animadverting upon the record which was filed. The statement on motion for new trial commences as follows: "The case being regularly called, the plaintiff introduced." Here the language breaks off abruptly. Instead of it appearing what the plaintiff introduced, the next page of the record is entitled: "Amendments Proposed by Defendants to plaintiff's Proposed Statement on Motion for New Trial." "Amend by striking out from said proposed statement, beginning at line 11, pages 1 and 2 thereof, and substitute therefor pages 1 to 73, as follows, inclusive." But the statement, as proposed, is difficult to identify. There is nothing to indicate what or where line 11, page 1, is. The record says: "Substitute pages 1 to 73, as follows." Probably this indicates those pages in the proposed amendments, but that paging is not carried into this record, and there is no way by which we can ascertain what they were. Commencing on the next page of the record, there follow 81 pages of the testimony, frequently by question and answer. Then the record states that the plaintiff rested, and defendants moved for a nonsuit, which motion it appears was overruled. On the next page of the record appear more amendments. The language is as follows: "Amend by striking from said proposed statement pages 3, 4 and 5 thereof, and substituting therefor the following pages 74 to 123." Again, this paging does not appear. On the next page of the record appears: "S. L. Davis, recalled on behalf of defendant." The record at this point seems to break into some matter which should appear somewhere else, but there is no showing as to what that matter is. Then follows a considerable amount of testimony introduced by the plaintiff. Finally, the record reaches a point where we find the following: "The foregoing amendments are correct, and are allowed without approval of form, and made part of the statement, and are ordered inserted therein. John J. McHatton, Judge." But these amendments were not

inserted in the statement, for immediately following the signature of the judge comes the language: "The plaintiff, to disprove the allegations of the proof of the libel of defendant, introduced the following witnesses, who testified as follows." Then is inserted testimony of a number of witnesses for plaintiff in rebuttal. The instructions are next inserted, and the motion for a new trial, and the specification of errors. After all this the court certifies that the above statement is correct, and the same is allowed.

This record is much like that in *Becker v. Commissioners*, 10 Mont. 87, in which case we said: "The engrosser, instead of constructing a perfect work, has simply piled up the material in a disorderly mass, as it came to his hand. That this is not an adherence to chronological order does not require extended discussion." (See, also, *Newell v. Meyendorff*, 9 Mont. 254, and cases there collected; *Barger v. Halford*, 10 Mont. 57, 24 Pac. 699; *Mont. Railway Co. v. Warren*, 6 Mont. 275, 12 Pac. 641; *Fant v. Tandy*, 7 Mont. 443, 17 Pac. 560; *Sherman v. Higgins*, 7 Mont. 479, 17 Pac. 561; *Raymond v. Therton*, 7 Mont. 299, 17 Pac. 258; *Rodoni v. Lytle*, 13 Mont. 123.)

In allowing the amendments in the case at bar, the judge made the same note as he did in the case last cited, namely, that he settled the same "without approval of form." But it is the duty of the district judge, if the statement is incorrect in substance or form, to require it to be made correct in both such respects before settling it. To settle a statement does not mean for the district judge to attach his approval to an incongruous mass of material, and leave it to the appellate court to decipher the matter which was before the district court. If the statement is not prepared as required by the law and practice and rules of court, it is the duty of the district judge to withhold his settlement. To so do is, as remarked in *Sherman v. Higgins*, 7 Mont. 482, "the proper practice, and we hope to see it universally adopted by the judges of the trial courts."

As said in *Newell v. Meyendorff*, 9 Mont. 264: "The mat-

ter is not presented in that orderly, systematic, chronological method that presents to the court an intelligent view of the case at a reading.”

It seems to be a severe course to strike out an appellant's record when he appears to have an appeal which should be sustained. Moreover, in this case the district judge was as much at fault in settling the statement as was counsel in preparing it. The record has been in this court for eighteen months, and no motion made to strike it out, and no oral argument made by the respondent on the hearing. We concluded to examine the case on its merits, but our doing so in this case is not a precedent for a further exercise of our patience in this respect in the future. The fact is that, since the views were expressed in the cases above cited, records have been much improved, and we have mercifully hesitated to suddenly make an example of the appellant herein.

Reversed.

PEMBERTON, C. J. and HUNT, J., concur.

MONTANA LUMBER AND MANUFACTURING COM-
PANY, APPELLANT, v. OBELISK MINING AND
CONCENTRATING COMPANY ET AL.,
RESPONDENTS.

[Submitted April 22, 1895. Decided April 29, 1895.]

APPEAL—Modification of judgment—Remittitur.—Where on remittitur to the district court, the court declined to modify the judgment so as to include certain property the supreme court will, on appeal, direct such modification to be made forthwith.

Appeal from Fifth Judicial District, Jefferson County.

ACTION to foreclose lien. A decree was rendered for plaintiffs below, by SHOWERS, J., and modified on appeal: 15

Mont. 20. The directions to modify the judgment not being complied with the plaintiff appeals. Modification ordered.

Walsh & Newman, for Appellant.

It was the duty of the lower court upon the filing of the remittitur to obey the mandate of the Supreme Court and enter judgment in accordance with the opinion expressed in the cause. (Hayne on New Trial and Appeal, § 299; *Heinlen v. Martin*, 59 Cal. 181; *Keller v. Lewis*, 56 Cal. 468; *Donner v. Palmer*, 45 Cal. 181.)

Corbett & Wellcome, for Respondents.

DE WITT, J.—This is the same case as that decided by this court September 24, 1894, reported in 15 Mont. 20.

In the opinion on the former appeal we said: "If this was a case where some particular piece of machinery had been added to a mill owned and leased along with the mine, it would of course, be proper to restrict the lien for such machinery to that which was added by the lessee, and such ruling would be in conformity with the views here expressed, because it is here held that the lien for things furnished the lessee cannot extend to the interest or estate of the lessor; but there is no contention in this case that any of the improvements upon which plaintiff sought to have its lien foreclosed, or any part of the same, existed on said premises, and was owned by the lessors, Hight & Fairfield, when they leased said premises. There is no denial that the improvements described in plaintiff's lien were wholly added to the leased premises by the lessee; and, if that be true, the same are subject to plaintiff's lien. The judgment should therefore be modified by decreeing the foreclosure of plaintiff's lien upon the structures described therein, and shown to have been placed on said property entirely by the lessee. The cause is therefore remanded for modification of the judgment in conformity with the views herein expressed. Judgment modified."

On the remittitur to the district court, the court declined to

modify the judgment by including in the property, upon which the lien was to be foreclosed, a certain boiler and engine. That boiler and engine were some of the improvements described in plaintiff's lien. It was the law of the case, as decided by the former appeal, that there was no denial that these improvements were wholly added to the leased premises by the lessee. It was also the law of the case, as then decided, that those improvements were subject to plaintiff's lien.

We do not understand that it is possible that the district court would refuse to follow the directions of this court; nor do we understand how it is possible that the opinion of this court, as formerly expressed, could have been misunderstood.

The district court is now instructed to do that which it was ordered to do in the former opinion, namely, to modify its original judgment by including the said boiler and engine in the property upon which the lien is to be enforced. Remittitur forthwith.

PEMBERTON, C. J., and HUNT, J., concur.

STATE EX REL HARTMAN ET AL., RELATORS, v. CADWELL, RESPONDENT.

[Submitted April 19, 1896. Decided May 6, 1896.]

ATTORNEYS—Disbarment—Alteration of decree.—In proceedings to disbar an attorney, a finding that an attorney interlined matter in a decree entirely changing its effect and with a corrupt purpose, is supported by evidence that when the decree was examined by two attorneys for the party affected by the alteration immediately before it was signed, it contained no interlineations; that another attorney who had testified in defendant's favor as to the time of making the interlineations, had stated upon being told that the decree was signed in open court, that if that was so he could do the respondent no good; that the decree was filed by defendant upon a peremptory order of the court after he had retained it for four months; and that after receiving intimation of disbarment proceedings had filed a motion to vacate or correct the decree, although he had been discharged as attorney for the plaintiff.

SAME—Same—Defrauding client.—A finding that certain notes were not delivered to respondent in payment for professional services and were without consideration, is sustained by evidence that a client of respondent, to defeat the collection of the costs of a criminal prosecution in which he had been convicted, had, upon the suggestion of respondent, executed to him the notes, secured by a mortgage, which were to be de-

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posited in a bank subject to their joint orders; that respondent had then been paid for his services and had given his client a receipt in full; that he deposited the notes in bank with the exception of one for \$300 which, with the mortgage, he negotiated to an innocent purchaser; that when the client demanded the notes respondent gave him an order on the bank and told him he could not release the mortgage without having it present, but saying nothing about making claim to the note or mortgage until the client wrote him that they were not in the bank, when he replied that he would release the mortgage when the client paid the note.

SAME—Same—Question presented by disbarment proceedings.—A charge or conviction of crime is not a prerequisite to proceedings for the disbarment of an attorney. The question presented by such proceedings is not whether the respondent is guilty of a crime of which he has been or ought to be convicted, but whether under all the facts of the case, he is a fit person to be permitted to practice as an attorney.

SAME—Competency of witness.—One who entered into a corrupt scheme with an attorney to defeat the collection by the county of the costs of a criminal prosecution against the former, may, in proceedings to disbar the attorney, testify as to the details of the scheme.

APPLICATION for the disbarment of an attorney. Granted.

Smith & Word and *O. F. Goddard*, for Relators.

Henry N. Blake, for Respondent.

E. P. Cadwell, pro se.

PEMBERTON, C. J.—This is a proceeding for the disbarment of the respondent who is an attorney at law, regularly licensed heretofore by this court, and enrolled as a member of the bar of this state.

The relators are all members of the bar, and comprise some of the most prominent attorneys of the state. They constitute nearly all the members of the local bar of Gallatin county.

The respondent, as the records of this court show, was admitted to practice law in this state on the 16th day of February, 1891. He has acquired a considerable practice, and achieved a prominent position among the members of the profession.

The respondent is charged with being guilty of malconduct in his profession as an attorney and counselor at law. It is also charged that he is a person whose general moral character is bad; and that he has been guilty of such fraudulent, deceitful, and immoral conduct and practices as to render him an unfit person to practice law in this state, or to be an attorney

and counselor of this court. The specifications of malconduct and of bad moral character are very numerous. Upon the filing of the pleadings in the case this court appointed E. C. Day, Esq., whose reputation for ability and integrity is second to no member of the bar of this state, referee, to take the testimony in the cause and report the findings of fact to this court. This report has been made in which the referee finds that some 17 of the charges are supported by the evidence. This court is now asked to adopt these findings, and enter the proper order and judgment in the case.

The specifications of malconduct are too numerous to discuss *seriatim*, and to do so would be useless, and without profit. We shall therefore confine our treatment to a few specifications, which are gravest in their character.

Specification "D" is as follows: "That prior and up to the 28th day of June, A. D. 1893, the case of Barbara Spieth vs. D. F. Grogan and J. P. Grogan, partners as D. F. Grogan & Bro., and Jesse H. Grogan, was pending in the ninth judicial district court of the state of Montana, in and for the county of Gallatin, upon the cross complaint and answer of said Jesse H. Grogan, and the answer and reply thereto of the said Barbara Spieth. That on or about the 27th day of June, the Hon. F. K. Armstrong, judge of said court, tried the same, a jury therein having been waived by the parties, and made certain findings of fact, and, pursuant to the practice in the said court, required the attorneys for the parties thereto to prepare a decree, and on or about the 29th day of June, A. D. 1893, the said E. P. Cadwell, defendant herein, being the attorney for the said Barbara Spieth, plaintiff, and Messrs. Cockrill & Pierce, two of the relators herein, being the attorneys for the defendant Jesse H. Grogan, appeared in open court before the said judge, and the said E. P. Cadwell, having theretofore prepared a decree in said case, submitted the same in open court to the said Cockrill & Pierce, attorneys for the said Jesse H. Grogan, as aforesaid, and the said Cockrill & Pierce, having examined the said decree, and being satisfied therewith, agreed

with the said Cadwell, in the presence of the said court, that the said decree was satisfactory, and the said E. P. Cadwell immediately handed the same to the said F. K. Armstrong, judge, as aforesaid, for his signature, and thereupon the judge signed the same as so agreed upon, and handed the same back to this defendant, E. P. Cadwell; a copy of which decree so agreed upon and so signed by the said court as aforesaid is attached hereto, and marked "Exhibit A," and made a part of this charge, and thereupon, after receiving said decree, so signed as aforesaid, the said E. P. Cadwell, without the knowledge and consent of the said Cockrill & Pierce, or the said court, or either of them, retained the said decree in his possession and control, and kept it there, and did not file the same with the clerk of the said district court for record, as by law provided, nor would he or did he file the said decree until October 28, A. D. 1893, upon which date, upon motion of the said attorneys, Messrs. Cockrill & Pierce, the said judge entered a peremptory order to the said E. P. Cadwell, requiring him to file the said decree by four o'clock of said day. And your relators aver that prior to the filing of the said decree by said Cadwell, this defendant, and subsequent to the signing thereof, on the 29th day of June, A. D. 1893, as aforesaid, and while the same was in his possession, custody, and control, he, the said E. P. Cadwell, this defendant, without the knowledge or consent of the said Cockrill & Pierce, or either or both of them, or the said judge of the said court, made in the said decree such interlineations as to wholly change the tenor and effect thereof, and filed the same, under order of the court as aforesaid, and with the clerk of said district court, on the 28th day of October, A. D. 1893; and upon the same or following day, the said H. C. Cockrill, one of the relators herein, went to the office of the clerk of the said court, and found the decree, as interlined, nearly recorded by the said clerk, and, upon an examination thereof, discovered the said interlineations for the first time (a copy of the said decree, so interlined by the said E. P. Cadwell, as aforesaid, is filed herewith, attached hereto,

marked 'Exhibit B,' and made a part of this charge); he, the said E. P. Cadwell, thereby intending to cheat and defraud the said Jesse H. Grogan of his right and interest in and to the real estate described in the said decree. That prior to the rendition of the said decree marked 'Exhibit A,' and attached hereto, there had been rendered in the said suit another decree in favor of Barbara Spieth against the said D. F. Grogan and J. P. Grogan, under and by virtue of which decree the property mentioned in Exhibit A had been sold to the said E. P. Cadwell, by the sheriff of the said county, he, the said Cadwell, taking the sheriff's certificate of sale in his own name, notwithstanding that he was at that time the attorney for the said Barbara Spieth. And at the time of the said interlineations the said E. P. Cadwell claimed to own all the right, title and interest of the said Barbara Spieth in and to the said certificate of sale of said real estate, and in and to the said decree in her favor, and also all the right, title and interest of the said D. F. and J. P. Grogan in and to the said real estate, under the said certificate of sale, the time for redemption of which by the said D. F. and J. P. Grogan or by J. H. Grogan had fully expired before the said decree was filed by the said Cadwell, as interlined as aforesaid, but had not expired at the date of the rendition of the said decree, and had not expired until on or about the 22nd day of September, A. D. 1893. That afterwards, some time in the month of September, 1893, the said E. P. Cadwell was discharged by the said Barbara Spieth, and ceased to act as her said attorney in the said cause, or in any other action in the said court, and was fully paid by the said Barbara Spieth for all services by him heretofore rendered. That, notwithstanding such discharge and payment, the said E. P. Cadwell (this defendant) having received an intimation that proceedings were likely to be instituted against him for disbarment or otherwise, by reason of such interlineation in said decree, as shown by said Exhibit B, hereto attached, filed in the said court on the 4th day of January, A. D. 1894, a written motion, as the attorney for the said Barbara Spieth, to

'affirm, vacate, or modify' the said decree, so as to make the same correspond to the 'findings of the court therein,' and gave notice of the said motion upon the motion book of said court."

The referee finds this charge sustained by the evidence. The decree of the court mentioned above is filed as an exhibit in the case, showing the interlineations the respondent is charged with making therein. The original decree was typewritten; the interlineations are made with a pen, and are confessedly in the handwriting of the respondent. By the original decree, J. H. Grogan, mentioned therein, was adjudged to have a prior mortgage and lien upon all the land mentioned therein, except forty acres, as against all the other parties named in said decree. The words interlined in said decree by respondent are as follows: "That the defendant J. H. Grogan be, and he is hereby, barred and forever foreclosed from having or claiming to have any interest in said land;" and were so interlined as to refer to all the lands mentioned in said decree, and to change entirely the effect of said decree, as to the rights adjudged to J. H. Grogan.

The testimony of T. M. Pierce and H. C. Cockrill, attorneys in the case, is clear and positive to the effect that said decree, before being signed by the court, was submitted to them by the respondent for inspection, and that said interlineations were not in it when signed. The respondent swears that they were in the decree when signed. C. G. Bradshaw, an attorney, also says that he suggested that the interlineations be made; and he says that upon his suggestion the respondent wrote them in the decree, and stepped into the judge's office adjoining that of respondent, or near by, and returned in a few moments, saying the judge had signed it. But W. L. Hollo-way swears that when Bradshaw made this statement to him in a conversation concerning the matter he told Bradshaw that the decree was signed by the judge in open court, and that Bradshaw then said: "If that is so, I can do Cadwell no good." W. G. Fleischhauer's testimony is to the same effect.

The respondent contends that said interlineations did not change the force or effect of the decree as to J. H. Grogan, or any one else. This may or may not be true. It is immaterial in this case. If the decree was not affected by these interlineations, why were respondent and Bradshaw so concerned about having them put in? Even if they did not affect the decree, and were not intended to affect it, what right had the respondent to alter the decree of the court after it was signed and ordered entered of record? If these interlineations were in the decree when signed, why did the respondent take it, and keep it in his possession, and refuse to deliver it to the clerk for record for months, and until the court by peremptory order required him to bring it into court, as shown by the undisputed evidence? And why, as shown by the evidence, did he object to the delivering it for record, when compelled to bring it into court, saying it was prepared by him and that, if the other side wanted a decree, let them draw or prepare it? Is such conduct without meaning? Do these actions of the respondent not only tend to show that the interlineations were made as charged, as to time, but that they were made for the corrupt purpose of defrauding J. H. Grogan, and advancing respondent's interest? We think the conclusion irresistible.

The action of respondent in filing a motion to vacate or correct this decree, after he learned that steps were being taken to disbar him, tends strongly to show that he understood that these interlineations did affect the decree, and that he felt that his conduct would tend to show when they were made, as well as the corrupt purpose in making them.

Specification "H" is as follows: "Your relators are informed and believe, and therefore allege the fact to be true: That one Samuel Smith was charged in the district court of the Seventh judicial district of the state of Montana, in and for the county of Yellowstone, on the 15th day of October, 1891, with assault with intent to commit murder, and the said E. P. Cadwell was employed by the said Smith as attorney to defend him on said charge. That the said case was tried on a change of

venue to the Ninth judicial district court of the state of Montana, in and for Gallatin county, in the latter court, and the said Smith was convicted, and sentenced to imprisonment in the penitentiary for one year; and, after such conviction, at the suggestion of the said Cadwell, for the purpose of covering up the property of him, the said Smith, to prevent the collection of the costs in the said case, the said Smith executed to the said Cadwell, this defendant, a mortgage of all the real estate of the said Smith in Yellowstone county, to secure notes amounting to \$2,600, it being agreed by and between the said Cadwell and his said client, Smith, that the mortgage and notes were to be afterward surrendered by him, the said Cadwell, to the said Smith, when the object of their execution, to wit, the defeat of the collection of the costs in the said case, had been accomplished; said notes and mortgage being executed and delivered without any consideration, except as aforesaid, and the said Smith having paid him, the said Cadwell, this defendant, his fee for the said defense, in full, in cash. That afterwards the said Cadwell, this defendant, returned to the said Smith all of the said notes, except one for \$600, which said note he, the said Cadwell, sold and transferred to Barbara Spieth, she at that time being a client of him, the said Cadwell; he, the said Cadwell, being her attorney. She, the said Barbara Spieth, having no knowledge whatsoever of the circumstances attending the execution of the said note, and by which the said Cadwell had come into possession thereof."

The referee finds this charge established by the evidence. The mortgage and notes mentioned in the above charge, as well as the written contract between respondent and Smith, and respondent's receipt to Smith, are all filed as exhibits in the case. Smith's testimony is positive as to every allegation in the charge. The respondent contends, and so swears, that the several notes mentioned in the mortgage, including the \$600 one, were given for services rendered and to be rendered by him for Smith. Let us examine the evidence. The receipt given by respondent to Smith, of the same date as that of the

notes and mortgage, was a receipt in full to that date. Smith says in his evidence: That while he was in jail at Bozeman, Judge L. A. Luce and respondent called to see him. They were his attorneys. That as they were leaving the jail he asked them if anything could be done to save his ranch from being taken for the costs of his case by the county. That Luce said he thought not. That, as Luce stepped out of the jail door, respondent told him that as soon as he was out on bail he could arrange it for him; that nothing could be done until then. That he got bail, and went home to Billings. That respondent came to Billings, and met him. Told him to come to his room at the hotel, and he would fix the matter. That he went with him to his room. That there the notes, mortgage, receipt and contract were all drawn by respondent. That respondent said the contract was necessary to show consideration for the notes and mortgage. That, being in a hurry, he signed the notes and mortgage, and took the receipt, and went away, leaving all the notes and the mortgage with respondent, who agreed to put them all in an envelope, and place them in the bank, with an indorsement on the envelope that the papers were not to be taken out except on the order of both himself and respondent. That he supposed respondent would deposit the papers as agreed. That the only reason for making the notes and mortgage to respondent was to defeat the county in any attempt it might make to collect its costs of Smith in the criminal case against him. That there was no other consideration. That he owed respondent nothing whatsoever. That the whole arrangement was made and entered into on the suggestion of respondent. That it was respondent's scheme to beat the county. That he did not see respondent again until after he was released from the penitentiary. That on his way from Deer Lodge to Billings he stopped off at Bozeman and saw the respondent. He then demanded of respondent an order on the bank for these notes and mortgage, and that respondent release the mortgage as per agreement. That respondent gave him an order for the papers, but said

he could not release the mortgage without having it present. That he told respondent he would send it up to him when he got it out of the bank, so he could prepare the release. Nothing was said by the respondent then to Smith about the \$600 note and mortgage not being in the bank with the other notes. That when he got the papers from the bank the mortgage and \$600 note were not among them; only the two \$250 notes and the \$1,500 note being in the envelope. These three notes were given at the same time the \$600 note was, and were all mentioned in and secured by the mortgage. That he at once wrote respondent, telling him that the mortgage was not among the papers in the bank, nor was the \$600 note. That respondent replied to this letter, saying he had the mortgage, and would release it when Smith paid the \$600 note. This was his first intimation that respondent claimed the \$600 note, and would not release the mortgage until it was paid. Suit has been begun by Mrs. Spieth to foreclose this mortgage, and to recover payment of Smith of this \$600 note.

Now let us look at this charge as disclosed by the uncontradicted evidence. When Smith called on respondent on his way home from prison, to get these papers, he was, according to respondent's theory, still his client, for respondent contends that these notes and mortgage were all given for service rendered and to be rendered after Smith's release. Was it not, then, a duty respondent owed to Smith, his client, to deal fairly with him, and tell him the truth about these notes and mortgage? Respondent knew then that he had the \$600 note and mortgage in his possession. He knew that they were not in the bank at Billings. He knew that he had never placed them there, as he had agreed with his client to do. He knew that he had sold this note, and assigned the mortgage to his other client, Mrs. Spieth. He knew also that in so doing he had deceived Mrs. Spieth. He had sold this note and assigned this mortgage to her without ever telling her about the circumstances under which they were executed. When Mrs. Spieth gave respondent the money, which he applied on the

sale to her of this note, she, according to her testimony, supposed she was making a loan of that amount to the man who owned the ranch in Yellowstone county, as the respondent, as her attorney, had advised the loan, telling her the ranch was worth \$2,000, and was good security for the same. There is no evidence that she supposed she was buying this note of respondent. She, it appears, is a German lady, of little English education, and left her money matters almost entirely to the management of respondent. Another thing: If respondent had any claim whatever to the \$600 note, why did he not have the same claim to the other notes? If all these notes were given for services rendered and to be rendered, why did respondent ever consent to have them placed in an envelope, and deposited in the bank, and not to be taken out except on the order of both himself and Smith? If the notes belonged to respondent, what right had Smith to say they should be put in the bank, and remain there until he consented to their withdrawal? These things, we think, strongly support the evidence of Smith that the only object and consideration contemplated in the execution of these papers was to defeat the county in the collection of its costs, as charged. These circumstances also tend to show that the respondent assigned this note and mortgage to Mrs. Spieth, knowing her to be without knowledge of the circumstances attending their execution, because he knew they were unavailing and valueless to him, and that the collection thereof could only be enforced by an innocent holder. If so, he was, beyond question, guilty of malconduct in his profession as an attorney and counselor at law. He thereby defrauded one client and deceived another.

It is not without interest to note here the objections of respondent to the testimony of Smith. He says Smith ought not to be permitted to testify, because he thereby seeks to impeach the validity of this note in the hands of Mrs. Spieth, who is an innocent holder thereof. It is true that Mrs. Spieth is an innocent holder of the note, and respondent's objection would be of greater force if this were a suit by her against

Smith thereon. But it is clear from the evidence that she would not have been the holder of said note at all if the respondent had not purposely and corruptly, as we think, withheld from her the facts and circumstances attending its execution when he sold it to her. He says also that Smith ought not to be heard to testify as to the corrupt scheme entered into with respondent to defeat the claim of the county for costs, because such scheme was not such a one as could succeed under the law; that under the law such scheme was nugatory. But this scheme, while it did not and could not defeat the county's right to recover costs against Smith, did succeed, it appears, in defrauding Smith of the note for \$600. Why did not respondent think of this when he induced Smith to enter into this fraudulent scheme? He knew that it was worthless then, as well as at any time afterwards. It does seem that Smith's unfortunate condition at the time of entering into this arrangement was such as to appeal to any well-paid, honest lawyer for genuine sympathy and fair treatment. Such objections would be ridiculous but for the wickedness they show. To what subterfuges does iniquity resort when uncloaked and brought to bay? While the respondent denies the object of entering into this scheme to defeat the county, he does not deny or attempt to disprove any of the facts and circumstances shown by the evidence, as detailed herein, in relation to the matter, or the transfer by him of said note and mortgage to his client, Mrs. Spieth.

We think the finding by the referee that the two charges above treated are supported and established by the evidence should be approved and adopted by this court.

It is contended by respondent that he ought not to be disbarred in this proceeding, because it is not shown that he has committed or been convicted of any crime. This contention proceeds upon the theory that this is a criminal proceeding. In *ex parte* Wall, 107 U. S. 265, 2 Sup. Ct. 569, a leading and exhaustive case on this subject, it is held that "the proceeding is in its nature civil;" that "the proceeding is not for

the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them." In this case it is further said, as to the necessity of a criminal prosecution or conviction as a prerequisite to bringing this proceeding: "Cases may occur in which such requirement would result in allowing persons to practice as attorneys who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice. A criminal prosecution may fail by the absence of a witness, or by reason of a flaw in the indictment, or some irregularity in the proceedings; and in such cases, even in England, the proceeding to strike from the roll may be had. But other causes may operate to shield a gross offender from a conviction of crime, however clear and notorious his guilt may be,—a prevailing popular excitement, powerful influences brought to bear on the public mind or on the mind of the jury; and many other causes which might be suggested,—and yet, all the time, the offender may be so covered with guilt, perhaps glorying in it, that it would be a disgrace to the court to be obliged to receive him as one of its officers, clothed with all the prestige of its confidence and authority. It seems to us that the circumstances of the case, and not any iron rule on the subject, must determine whether and when it is proper to dispense with a preliminary conviction."

In *In re Treadwell*, 67 Cal. 353, 7 Pac. 724, a disbarment proceeding, it is said: "In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him, for the purpose of determining whether under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts under the license which has been granted to him, and not for the purpose of adjudging whether he is guilty of a commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar

an attorney. If an attorney be found by a court guilty of acts indicating professional moral depravity, the court can, without previous conviction of a criminal offense, prevent the repetition of such official acts by taking away the license under which they have been committed. This it will do, not only in the interest of justice and of the public, but of the legal profession, which, like the court itself, ought to be free from all suspicion. It is indispensable that an attorney be trustworthy."

In *State v. Winton*, 11 Or. 456, 5 Pac. 337, it is said: "Legal knowledge and skill are not the only requisite of attorneys, but they must be conjoined with that ancient requirement of the law, integrity of character. Before admission to his office, as regulated by the Code, he must prove by evidence satisfactory to the court that he is a person of good moral character, and show by an examination in open court that he possesses the requisite learning and ability. * * * Upon an order being entered reciting these facts, he receives his certificate of admission, and becomes entitled to practice in all the courts of this state. The order of admission is the judgment of the court that he possesses these qualifications, and is fit to be intrusted with the responsible duties of his office. It, in effect, certifies to the community that he is competent to advise in legal matters, or to conduct legal proceedings, and is of such 'good moral character' as will be a pledge to those dealing with him professionally of fidelity and honesty to their interests. And to this is added the sanction of his official oath to be faithful, upright, and honest in all duties which may devolve upon him as an attorney. These duties often comprise grave responsibilities and interests of the highest conceivable character; life, liberty, reputation, and property are often intrusted to his care. It is indispensable that he be trustworthy, and of unswerving integrity of character in his official relations. As prerequisite to his admission, they must be enduring and distinctive traits of his character while he exercises the high prerogative of his office. A lapse from them, upon a proper showing, in his official conduct, is fatal to his right to be an attorney. Justice to the court, protection to the public, and

the honor of his profession alike inexorably demand that he act with fidelity and honesty to the interests intrusted to his care. Whenever, therefore, it is made to appear to the satisfaction of the court that an attorney has been guilty of conduct or acts committed inside or outside of his professional employment, which show him utterly unfit to practice law and to participate in the official ministration of justice, the court will exercise its summary powers, and disbar him." See also Weeks on Attorneys at Law, § 80, and authorities cited.

We think the great weight of authority is to the effect that a charge or conviction of crime is not a prerequisite to the proceeding for the disbarment of an attorney.

The question presented by this proceeding is not whether the respondent is guilty of a crime of which he has been or ought to be convicted, but whether, under all the facts of the case, he is a fit person to be permitted to practice as an attorney and counselor at law in this state.

We think that an attorney who will take a decree of court into his possession, and surreptitiously change and alter it, with the corrupt purpose and intent to defeat the rights of the parties thereto, and to advance his own interests, is not, and cannot be said to be, a fit person to practice and assist in the ministration of law and justice in this state. We think a person who, by one corrupt scheme or transaction, and in the consummation thereof, will willfully defraud one client and deceive another, is not entitled to use the license of this court to carry on such nefarious practices as an attorney and counselor at law in this state.

The respondent also contends that he ought not to be found guilty under charge "H," because, he says, the only witness against him is Smith, who is a pardoned convict. It is true that Smith is in this condition, but nearly all the facts and circumstances detailed in the evidence of Smith are corroborated. The respondent only disputes his testimony as to the purpose of the scheme entered into by them. Smith is not otherwise contradicted. The offense of which he was convicted does not

necessarily degrade him, or detract from his credibility as a truthful man. No attempt was made to impeach his testimony, whereas throughout this whole case the evidence of the respondent is contradicted by other witnesses. His whole defense depends upon his own testimony and that of one C. G. Bradshaw. Bradshaw seems to have been the intimate friend, and sometimes the adviser, of respondent. And, besides, the general reputation of both respondent and Bradshaw for truth and veracity is shown by the evidence to be bad.

Respondent, after some eighteen of his neighbors testified that his reputation in this regard is bad, attempted to defend his good name by offering proof in rebuttal. But we think he did not succeed. Bradshaw makes no such attempt. We therefore find nothing in this contention to authorize us to interfere with the finding of the referee.

There are a number of charges involving the malconduct and bad moral character and want of truth and veracity on the part of respondent as an attorney and counselor at law, but the conclusions reached above render it unnecessary to treat them.

As noted in the statement of this case, the relators constitute nearly all the local bar of Gallatin county, of which they and respondent are all members. Numbered among them are some of the most prominent lawyers of the state, whose high characters and reputations for integrity preclude the idea that in prosecuting this proceeding they have been actuated by jealousy or malice or other impure motives. There is nothing in the case to authorize the belief that they have been controlled by aught else than a desire to protect the courts, the profession and the public from the scandals and wrongs resulting from permitting an unfit person acting as an officer of this court and participating in the ministration of the law in this state.

A careful consideration of the whole case forces us reluctantly to the conclusion that the respondent is an unfit person to practice as an attorney and counselor at law in this state, and that our duty to the courts, the profession, and the public requires at our hands a judgment that he be disbarred.

It is therefore the judgment of this court that the license as an attorney of E. P. Cadwell, respondent, is revoked, and that his name be stricken from the roll of attorneys of this court, and that he is debarred from practicing in any of the courts of this state, or from exercising any of the privileges of an attorney or counselor at law.

DE WITT and HUNT, JJ., concur.

FIRST NATIONAL BANK OF MISSOULA, APPELLANT,
v. BAILEY, RESPONDENT.

[Submitted April 19, 1895. Decided May 6, 1895.]

TAXATION—Assessment list—Notice.—The revenue act of 1891 (Second Session, page 75, §5) requires property to be assessed at its full cash value, and therefore, where a taxpayer returns to the assessor a list of property, from the total and apparent cash valuation of which he appears to have deducted one-third, the assessment of the property by the assessor in accordance with such total valuation is not an increase of the assessment list, nor would the taxpayer be entitled to notice that the assessor had not assessed the property at one-third less than its cash value, as returned, but had assessed it in the only manner permitted by law.

ON MOTION for rehearing. Denied. For former report see 15 Mont. 301.

Marshall & Corbett, for Appellant.

Henri J. Haskell, Attorney General, *J. M. Dixon* and *J. G. Denny*, for Respondent.

PEMBERTON, C. J.—Counsel, in their able argument and brief in support of the petition for a rehearing in this case, contend that the assessor changed or increased the assessment list returned by appellant without notice, and that such action on the part of the assessor was void, as to such increase in the assessment; and further that, notwithstanding this contention was not relied on in the court below or in this court on the original hearing, said contention may be presented on this pe-

tition for rehearing, as it is germane to the issues presented by the pleadings.

The list of property returned to the assessor is as follows:

Lots 6 and 7, block 1, Old Townsite addition.....	\$ 1,000 00
Lot 19, block 21, Higgins addition.....	2,000 00
Improvements on same.....	2,000 00
78x118 feet, corner Front street and Higgins avenue.....	10,000 00
Improvements on same.....	40,000 00
Capital stock, 1,500 shares.....	150 000 00
Surplus and undivided profits.....	320,000 00
	<hr/>
	\$525,000 00
Less real estate and improvements.....	55,000 00
	<hr/>
	\$470,000 00
Less one-third.....	156,660 00
	<hr/>
	\$313,340 00

From an examination of this list, we think it clearly appears that the appellant fixed the real value of its property listed and returned to the assessor at \$470,000, and not at \$313,340, as claimed now for the first time. The appellant claimed, it is true, a deduction of one-third the value thereof, amounting to \$156,660, as shown by said list. But did the claiming this deduction for assessment purposes change in any way the value of said property? The appellant was claiming something the law does not warrant, and something the law does not authorize the assessor to grant. The law requires the assessor to assess property "at its full cash value." (Act Concerning Revenue, Laws 1891, page 75, § 5.) The assessor did not change, alter or increase in any way whatever appellant's assessment list. It must be conceded that, when appellant returned its assessment list, it did not fix any fancy value upon its property, and then deduct one-third therefrom, in order to arrive at its full cash value. People dealing with assessors rarely put a greater value than the cash value on their property. The assessor did not increase the assessment of appellant. He assessed it in accordance with the list returned by the appellant. He did decline to assess it at one-third less than its cash value, as returned, and as claimed by appellant. But by so doing he did not change or increase the assessment. In doing

so he performed his duty, and was under no obligation to give the appellant notice that he had assessed its property in the only manner permitted by the law.

We are further of opinion that the contention insisted upon in support of the petition for a rehearing is not developed by any facts set forth in the pleadings. The complaint alleges the value of the property to be \$470,000, without any suggestion that it was of less value. There is not an intimation in the complaint that the assessor, in assessing the property, changed or increased the value thereof, as returned in the list of appellant. Nothing of the kind was claimed or suggested by the original briefs or arguments in the case. The assessor assessed the property at its cash value, as shown by the list returned by appellant, and ignored its unwarranted claim of a deduction of one-third of the value thereof for assessment purposes. It is true, the assessment list of the appellant is made part of the complaint as an exhibit, but it is nowhere contended or intimated that it was intended to show that the assessor had changed or increased the value of appellant's property, in assessing it, either with or without notice.

The importance of this case, and the able brief and argument of counsel in support of the petition for rehearing, have led us to a careful consideration of the matters involved; and, after such consideration, we are of the opinion that the case was rightly determined, under the pleadings, on the original hearing, and that the conclusion therein reached should not be disturbed.

The petition for a rehearing is denied.

DE WITT and HUNT, JJ., concur.

STATE, RESPONDENT, v. VINEYARD, APPELLANT.

[Submitted April 29, 1895. Decided May 6, 1895.]

FORGERY—Evidence.—In the case at bar it appeared that defendant and one H. T. Swenson were lessees of a mine, working it under an agreement between themselves that all the ore should be shipped in the name of said S.; that defendant, after delivering certain ore and receiving a check therefor in the name of H. J. Swanson, inquired of S. what his initials were, and, upon being told, said that he had made a mistake and given them as "H. J.;" that S. then told him it was no matter as he (S.) could get the check cashed; that defendant without authority, and permitting himself to be identified as the payee, endorsed the check, cashed it and retained the money. *Held*, that the facts were sufficient to sustain a conviction for forgery.

SAME—It is forgery to sign a money order or check of apparent legal efficiency in an assumed name, if the name was assumed to defraud the person to whom the order or check is given, or if under such circumstances as are likely to defraud.

Appeal from Second Judicial District, Silver Bow County.

CONVICTION for forgery. Defendant was tried before SPEER, J. Affirmed.

Miles Javanaugh and L. C. Campbell, for Appellant.

Henri J. Haskell, Attorney General, and Ella L. Knowles, for the state, Respondent.

A person commits forgery who, personating another, fraudulently, writes his name. (Bishop's Criminal Law, Vol. 2, § 585.) Where a check comes into the hands of a person, who knows that it is not intended for him and that person endorses it with the fraudulent purpose of getting the money, he is guilty of forgery. (*United States v. Long*, 30 Fed. 678-80; *Rauch v. State*, 51 N. W. (Neb.) 755; Bishop Crim. Law, Vol. 2, § 587.) The fact that the name forged is misspelled makes no difference. (*Rudical v. State*, 13 N. E. 114, S. C. 111 Ind. 595; Bishop's Crim. Law, Vol. 2, § 593; *State v. Covington*, 94 N. C. 913; A. & E. Encl. Law, Vol. 8, page 462.) From the intent to pass as good, the law draws the conclusion of the intent to defraud whatever person is defrauded. (Bishop on Crim. Law, Vol. 2, § 598.)

HUNT. J.—Phillip P. Vineyard, the appellant, was con-

victed of the crime of forgery, and sentenced to one year in the state's prison. From the judgment of conviction he appeals.

The information under which he was tried charges that said Vineyard "did willfully and unlawfully and feloniously and falsely and fraudulently, forge, utter, pass, and publish, as true and genuine, to one John Stromberg and one Jerry Mullins, a copartnership doing business under the firm name and style of Mullins & Stromberg, in Butte City, in said county and state, a certain writing on paper and check for the payment of money, and instrument in writing, of the tenor, purport, and effect following, to-wit:

'BUTTE, Mont., Jan. 24, 1895. No. 1,152.

Butte Sampling Works. H. C. Carney, C. H. Hand. State Savings Bank: Pay to H. J. Swanson or order \$85 83-100 (eighty-five and 83-100 dollars). [Signed]

H. C. CARNEY, Manager.

BUTTE SAMPLING WORKS.

[Indorsed] H. J. Swanson. Mullin & Stromberg. First National Bank. Paid Jan. 28, 1895. Paying Teller, Butte, Montana.'

"With intent in him, the said defendant, thereby, and in the manner and form aforesaid, to willfully and unlawfully and feloniously, and falsely and fraudulently, cheat and defraud the said John Stromberg and the said Jerry Mullins (Mullins and Stromberg, as aforesaid) of the said sum of eighty-five and 83-100 dollars, contrary, etc."

In the argument of the case, appellant's counsel urged the insufficiency of the evidence to justify a conviction, and stated that he relied upon that assignment principally.

It appears that since November or December, 1894, defendant and one H. T. Swenson, and two others worked together under a mining lease. It was agreed in writing that shipments of ore be in the name of H. T. Swenson. On January 24, 1895, defendant went to Swenson, and asked him his initials. Swenson said, "H. T." Defendant told Swenson that he had delivered "that ore" (referring to a shipment) at the Butte

Sampling Works, but believed he had made a mistake in Swenson's initials, and put them "H. J.," as he had forgotten the correct initials. Swenson told him it was no matter, as he could get the check cashed. The next day the defendant said he had had the check cashed, and that it had been made out to H. J. Swanson. Defendant had no authority from Swenson to sign the check for him. Swenson never signed the same himself, and never received the money on the check. Defendant always called Swenson "Swanson." The ore was left at the sampling works by Vineyard in the name of H. J. Swanson. Appellant called the attention of Dayton, one of his co-lessees, to the "mistake" he had made, whereupon Dayton told him it would make no difference, as Swenson could get the same cashed. The next day there was some talk of a settlement, but it amounted to nothing more than a claim of appellant for money due him by his co-lessees. The check was presented by defendant to Stromberg, of the firm of Mullins & Stromberg. Stromberg, not knowing defendant, asked one Swan, who was with defendant when the check was presented, "Do you know this gentleman?" To which Swan replied, "Yes, sir." Thereupon defendant took a pen and indorsed the check "H. J. Swanson." No explanation was made of the real identity of the accused to Stromberg, and Stromberg says he understood at the time that the man whose name defendant indorsed was the payee of the check, or "H. J. Swanson," otherwise he would not have cashed it. The check was cashed by the First National Bank of Butte, for Mullins & Stromberg. They took it to the State Savings Bank, where payment was refused.

The defendant testified that he had given the name of H. J. Swanson to the sampling works in order to avoid trouble, in the way of attachments, if he used his own name; that the next day after he had cashed the check the several lessees had figured on their expenses, and the others were in debt to defendant; that Swenson declined to pay anything and threatened to arrest defendant for forgery unless defendant surrendered

half the money; that he knew "H. J. Swanson" was not Swenson's name, but he did not intend to ship the ore in Swenson's name; that he had no particular reason for not shipping the ore in accordance with the agreement, still he did not ship in Swenson's name, but considered he was entitled to the money. "I did not write Mr. Swenson's name on that check, therefore could commit no crime of forgery," testified defendant; and "I don't know that Mr. Swenson was the man that the money was intended for. * * * I wanted to avoid my creditors, and the name (H. J. Swanson) was just an assumed, fictitious name, without particular thought of the similarity between it and that of my partner." Defendant denied the interview with Swenson as to his initials, but admitted that when he presented the check to Stromberg the latter asked Swan "if that was the man, and Swan said I was."

Defendant denied that the agreement to ship was still in force. Swenson, in rebuttal, said it was.

From all these material facts, supplemented by others of minor importance, the jury were justified in finding that the defendant knew that the check was not intended for him, but for Swenson, and was so intended under the terms of the agreement between the defendant and his co-lessees. We are convinced, too, by the evidence, that, when defendant and Swan procured the money on the check, defendant's purpose was to have Stromberg cash it, as if doing so for the payee, Swenson or Swanson, and that he willfully meant to mislead and did deceive Stromberg into the belief that he (Vineyard) was the person to whose order the check was drawn. His silence when Stromberg asked for identification, and when Swan said he knew him, is, by itself, almost enough to convict him, for it is inexplicable with the actions of an honest man under similar circumstances. If a man goes to a stranger with a check made out to another, permits himself to be identified as the real payee, and secures the amount of the check as an accommodation, after making a fictitious or forged indorsement thereon, we unhesitatingly say that his intent is *prima facie* criminal,

and to hold otherwise, under the facts of this case, is contrary to all logical processes of reasoning by evidential induction, and to indulge in metaphysical abstractions wholly unwarranted by the testimony in the record. The evidence convinces us that the defendant meant to and did personate Swenson, and fraudulently, with intent to impose on another, wrote the name "Swanson" on the check. Thus was a forgery committed, within the legal definitions of the crime.

The defendant says that "Swanson" was a fictitious name. But, unfortunately for him, it is forgery to sign a money order or check of apparent legal efficiency in an assumed name, if the name was assumed to defraud the person to whom the order or check was given; or it may be forgery to sign the name of a nonexistent person, if under such circumstances as are likely to defraud. (Wharton's Criminal Law, §§ 659, 660; Bishop's Criminal Law, § 587.)

The check was apparently sufficient upon its face to prejudice the rights of another person, if falsely made, or passed with a fraudulent purpose. It was well calculated to deceive men of business capacity, and did deceive Stromberg.

The cunning of defendant, in misspelling Swenson's name, tends to show some deliberation in the method of the offense; but the similitude between "Swenson" and "Swanson" was close enough to be submitted to the jury, and it was for them to say whether, under all the facts and circumstances, the forgery was adapted, under the rules of law, to carry out the intended fraudulent purpose. (Bishop's Criminal Law, §§ 583, 592; *Thompson v. State*, 49 Ala. 16; *United States v. Mitchell*, 1 Baldw. 366, Fed. Cas. No. 15,787; *State v. Givens*, 5 Ala. 747; *State v. Hahn*, 38 La. Ann. 169; *Peete v. State*, 2 Lea (Tenn.) 513; *State v. Covington*, 94 N. C. 913; *State v. Bauman*, 52 Iowa 68.)

Certain errors are assigned in the refusal to give several instructions offered by the defendant upon the degree of certainty necessary to exist in the minds of the jury before they could convict. But the court fully charged upon the presump-

tion of innocence, and told the jury that they must be satisfied by the evidence of the defendant's guilt, beyond a reasonable doubt, in order to convict, and explained what a reasonable doubt was, by the approved definition of this court in *Territory v. McAndrews*, 3 Mont. 158. The whole ground of the burden of proof was covered. The instructions, as a whole, were full and clear, not only in stating the legal elements of the crime charged, but in elaborating the need of proof of an intent to defraud, as a material part of the state's case in order to justify a verdict of guilty. The verdict was in accord with the evidence, and the assignments made are not well founded. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

PEARSON, RESPONDENT, v. HARPER, APPELLANT.

[Submitted April 30, 1895. Decided May 6, 1895.]

16	143
24	558

APPEAL—*Conflict in evidence*—Where there is a substantial conflict in the testimony the appellate court will not disturb the verdict.

Appeal from Second Judicial District, Silver Bow County.

ACTION to recover for services. Judgment was rendered for the plaintiff below by McHATTON, J. Affirmed.

Corbett & Wellcome, for Appellant.

L. J. Hamilton, for Respondent.

DE WITT, J.—This is an action for \$67.50, as compensation for services alleged to have been rendered by plaintiff to defendant. The suit was commenced in a justice's court, where there was a verdict for plaintiff for the full amount claimed. On appeal to the district court there was also a verdict for

plaintiff for the same amount. Defendant appeals to this court. He assigns that the verdict was against the evidence. Defendant was city engineer of the city of Butte. Plaintiff worked during the months of May, June, July and August. There was a dispute in the testimony as to whether the plaintiff was working for defendant or the city of Butte. The city council directed that one of the city engineer's assistants be laid off on September 1st. Plaintiff testified that he worked during the first week in September in the place of another of the engineer's assistants, and that for this work he was paid by that assistant. He testified that he worked personally for Mr. Harper during the balance of the month. Indeed, his testimony was that he was always working for Mr. Harper personally. This action is for his services alleged to be rendered during the last three weeks in September, for which he was not paid. The defendant's contention was that plaintiff was in the employ of the city only, while plaintiff contended that he was in the employ of Mr. Harper at all times, and that he continued his services during the last three weeks of September for Mr. Harper, and was not notified by him to quit.

We have read all of the testimony of the case, and, while we are not satisfied that we should have found as did the jury, still there was a substantial conflict in the testimony, and sufficient evidence for the plaintiff to forbid our setting aside a verdict twice found by a jury, and affirmed by the district court when it denied the motion for a new trial.

The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE EX REL. EAVES ET AL., RELATORS, v. RICKARDS
 ET AL. CONSTITUTING THE STATE FURNISH-
 ING BOARD OF THE STATE OF
 MONTANA, RESPONDENTS.

16	145
21	48
16	145
123	49
23	51
16	145
26	38

[Submitted May 2, 1895. Decided May 6, 1895.]

STATE CONTRACTS—Mandamus—Responsible bidder defined.—The term "responsible" as used in the phrase "lowest responsible bidder" does not refer to pecuniary responsibility only, but includes judgment, skill, ability, capacity and integrity, and therefore, officers intrusted with the duty of awarding a contract to the lowest responsible bidder must exercise official discretion in determining the question and cannot be compelled by mandamus to award a contract to a particular bidder merely because he has offered the lowest bid and tendered a sufficient bond.

SAME—State furnishing board—Discretion in awarding contracts.—The rejection by the state furnishing board of a bid for the publication of the Montana Codes, although the lowest and accompanied by an offer of adequate security, was not a wrongful or arbitrary exercise of discretion where it appeared that the bidders discussed and explained their bids exhaustively to the board and their capacity to perform the work; that the board acted with deliberation and took adjournments to make further inquiries and, after considering all the facts and information which they could reasonably be expected to obtain, determined that the unsuccessful bidder had not the facilities to perform the work.

SAME—Member of legislature—Interest in contract.—Awarding a contract for state printing to a publishing company whose business manager was, at the time, a member of the state legislature, but who received a fixed salary for his services and had no interest in the profits of the company, does not violate § 30, Article 5, of the constitution, providing that no member of any department of the government shall in any way be interested in such contract.

MANDAMUS to compel state furnishing board to award a contract for printing codes to a particular bidder. Dismissed.

Statement of the case by the justice delivering the opinion.

The matter before us is a decision upon the return of an alternative writ of mandamus. The respondents, constituting the state furnishing board, let a contract to the Inter-Mountain Publishing Company for printing, annotating and binding the Codes which were adopted at the fourth session of the legislative assembly.

The act of the legislature, approved March 7, 1895, as to the printing of the Codes, provided, among other things:

"§ 4. The said Codes, as compiled and codified by said

commissioner, shall be annotated by the publisher thereof as fully and completely as Hill's Annotated Statutes and Codes of the state of Washington, in so far as the reports of the supreme court of the state of California are contained, and shall contain full annotations of the Montana Reports to April 1, 1895. They shall be published in two royal octavo volumes, equal in size, quality of paper, press work and binding, and similar in respect to the type used, to said Hill's Codes.

"§ 5. The state furnishing board of the state of Montana are required to immediately contract for the publication and annotation of said Codes, as specified in this act, contracting with the lowest responsible bidder therefor, which contract must not exceed the sum of eight thousand five hundred and fifty-five dollars for the publication and annotation of one thousand sets, containing two thousand three hundred pages, or less, and two and twenty-five one hundredth dollars for each additional page.

"§ 6. The contract shall specify that one thousand sets shall be printed, published and delivered to the secretary of state, on or before the 30th day of June, 1895. That the type setting, printing and binding of said Codes shall all be done within the state of Montana. That the publisher shall keep on hand, and for sale, at price not to exceed ten dollars per set, a sufficient number of copies of said Codes to supply all demands for a period of not less than eight years. That the publisher shall also make and keep on hand a full and complete set of stereotype matrices of each and every page of type used in printing the Codes."

As to public printing, the constitution of the state provides as follows: "All stationery, printing, fuel and lights used in the legislative and other departments of government, shall be furnished, and the printing and binding and distribution of the laws, journals and department reports and other printing and binding, and the repairing and furnishing the halls and rooms used for the meeting of the legislative assembly, and its committees, shall be performed under contract, to be given to the

lowest responsible bidder, below such maximum price, and under such regulations as may be prescribed by law. No member or officer of any department of the government shall be in any way interested in such contract; and all such contracts shall be subject to the approval of the governor and state treasurer." (Article V., § 30.)

The application for the writ sets forth that on or about March 17, 1895, the state furnishing board caused to be published the following notice :

"Proposals for Printing. Office State Furnishing Board, Helena, Montana. March 13, 1895.

Notice is hereby given that the state furnishing board, in accordance with the provisions of an act entitled, 'An act to provide for the compilation, codification, publication, distribution and sale of the Code of Civil Procedure, Civil Code, Penal Code and the Political Code,' approved March 7, 1895, will receive proposals for the printing, binding, publication and annotation of the Political, Civil, Penal Code and the Code of Civil Procedure of the state of Montana, as codified by the code commissioners, in two royal octavo volumes, equal in size, quality of paper, presswork and binding, and similar in all respects to the type used, to Hill's Annotated Statutes and Codes of the state of Washington, as fully and completely as Hill's Codes are annotated, in so far as the reports of the supreme court of the state of California are contained, and, as well, full annotations of the Montana Reports to April 1, 1895. All bids must be filed with the secretary of this board on or before April 4, 1895, and be indorsed 'Proposals for Printing Codes of Montana.' The Board reserve the right to reject any and all bids.

J. E. Rickards, L. Rotwitt, H. J. Haskell, State Furnishing board."

The relators further state in their affidavit upon which they ask for the writ of *mandamus* that, in pursuance to said notice, they submitted to the board a bid for annotating, printing, and binding of said Codes, in the sum of \$7,795, and \$2.25 per page for each page exceeding 2,300, and that they

submitted another bid to annotate, print and bind, and deliver the required number of volumes for the sum of \$8,290; that each of said bids was below the maximum provided by law to be paid for said service, and also lower than that of any other bid submitted; that they offered to execute a good and sufficient bond in the sum of \$10,000, or in any other sum which the board might require. They allege, further, that they are experienced publishers, and responsible and capable artisans, engaged in devoting their services, skill, experience and ability to their business; that they are financially able to procure the services of competent and skillful codifiers and annotators to aid them, and are competent and responsible for the faithful execution of the work in a skillful and workmanlike manner. They set forth, further, that other proposals or bids were filed; that the board examined the bids on April 4, 1895, and that the bid of the relators upon the first proposition submitted was \$760 less than that of the Inter Mountain Publishing Company, and, upon the second proposition submitted, \$265 less than the bid of said company. They further set out in their affidavit that the Inter Mountain Publishing Company is disqualified to contract for said work, because, as they are informed and believe, James H. Monteith is a member of said company as a stockholder and officer therein, and business manager thereof, actively and personally engaged in the management and promotion of the interests of said company, and as such is interested in the contract; and that the said James H. Monteith is now, and during all the times herein mentioned was, a member of the legislative department of the state, as representative from Silver Bow county, which legislature passed the act for said printing, binding and annotating the Codes. Relators further set up that by virtue of the facts stated it was the duty of the state furnishing board to award said contract to relators, and that they demanded that such action be taken by the board, but that, notwithstanding the facts set up, the board wrongfully, arbitrarily, and in disregard of the duty enjoined upon it, and contrary to the provisions of the constitution and laws, wrongfully resolved and pretended to award said contract to

the Inter Mountain Publishing Company. Relators allege that they are beneficially interested by reason of their being bidders, as described, and being entitled to the award of said contract, and also by reason of their being citizens and taxpayers of the state. They prayed a writ commanding the board to award said contract to them.

Upon this affidavit an alternative writ was issued, commanding the said board to convene and revoke the award of the contract to the Inter Mountain Publishing Company, and award the same to the relators, as the lowest responsible bidders, or to show cause on the 18th of April why they had not so done.

The respondents filed a demurrer, and a motion to quash. Decision was reserved upon the question raised by said motion and demurrer, and respondents were ordered to file their answer. The answer being filed, there appeared to be a denial of most of the material allegations of the affidavit, and it seemed that there were raised questions of fact essential to the determination of the matter. This court thereupon appointed a referee, and in the order appointing him defined the issues upon which he should take testimony.

The issues of fact, as set forth in the order of reference, were as follows:

“(1) Was James H. Monteith, mentioned in the affidavit in this case, a stockholder of the Inter Mountain Publishing Company at the time of the awarding of the contract herein mentioned to the Inter Mountain Publishing Company, or at any other time mentioned in said affidavit?

“(2) Is the said James H. Monteith interested, or was he at the time of the letting of the contract interested, in any manner whatever, in the contract awarded as aforesaid to the said Inter Mountain Publishing Company? If so, how, and to what extent?

“(3) Did the relators, in making their alleged bid, offer to execute or deliver to said board a good and sufficient bond or undertaking, or any bond or undertaking, for the sum men-

tioned in the affidavit, or any sum, for the performance of the contract?

“(4) Did the state furnishing board, in awarding the contract in question, make inquiry as to whether the relators were financially able to procure the services of competent and skillful codifiers and annotators; and, if so, what inquiry did they make?

“(5) Did said board, in letting the said contract, make inquiry as to whether relators were competent or responsible for the performance of the contract in a skillful and workmanlike manner, according to the requirements of law; and, if so, what inquiry was made?

“(6) Did the board, in awarding the said contract, make inquiry as to whether the relators were able to annotate the said Codes as fully and completely as Hill's Annotated Statutes and Codes of Washington are annotated, in so far as the reports of the state of California are contained; and, if so, what inquiry was made?

“(7) Did the said board, in awarding the said contract, make inquiry as to whether relators were capable, and could do or cause to be done the typesetting, printing, and binding of the said Codes within the State of Montana, or could have published the same as required by law; and, if so, what inquiry was made?

“(8) Did the state furnishing board, before awarding said contract, meet for the purpose of considering bids submitted to them, and what examination did they make of said bids? Did they hear relators, and other persons who had presented bids? What inquiry did they make as to the ability and qualification of said bidders to perform the said work? What inquiry did they make as to the responsibility of the several bidders, financially and otherwise? Was the determination of the said board to award the contract to the Inter Mountain Publishing Company based upon the facts inquired into by them?”

The referee has filed a voluminous report. Counsel argued the law of the case fully upon the motion to quash and the de-

murrer, and have also discussed the questions of law and fact since the filing of the referee's report.

Wilbur F. Sanders and *E. N. Harwood*, for Relators.

Henri J. Haskell, *Wm. Scallon* and *E. S. Booth*, for Respondent.

DE WITT, J.—As we have viewed the case from its inception, there seem to be only two main propositions for the decision of this court: (1) Had the state furnishing board, in awarding this contract, discretionary powers? This is the question of law in the case. (2) If the first proposition be answered in the affirmative, did the board wisely exercise such discretion, or did they, as alleged by the relators, exercise it “wrongfully, arbitrarily, and in disregard of duty”?

We will first address our attention to the question of law. It is true that the relators were the lowest bidders for this contract, and it is probably true that they offered to give a bond for the faithful execution of the same if it were awarded to them, and they allege that they were competent and skillful for the performance of the service. But does this conclude the state furnishing board? Is the offer of the lowest bid and the tendering of a bond sufficient to constitute one the lowest responsible bidder? The authorities do not so hold. The board must let the contract to the lowest responsible bidder. Responsibility includes judgment, skill, ability, capacity, and integrity, and it is the duty of the furnishing board to wisely and honestly determine this question of responsibility.

It is said in *Merrill on Mandamus* (section 117): “The law generally requires public officers who are charged with letting contracts for public work to accept the lowest bid therefor and to make the contract accordingly. When such bidder has fully complied on his part with the requirements of the law, he may by the writ of *mandamus* compel the officer to make the contract with him. The writ has been considered appropriate in relation to a contract for constructing county buildings (*Boren v. Commissioners*, 21 Ohio St. 311; *State v. Board of Com'rs*

of *Licking Co.*, 26 Ohio St. 531); for state printing (*State v. Barnes*, 35 Ohio St. 136; *State v. Printing Com'rs*, 18 Ohio St. 386; *American Clock Co. v. Com'rs of Licking Co.*, 31 Ohio St. 415); for articles to be purchased for use of the county for building a bridge (*People v. Buffalo Co.*, 4 Neb. 150); for repairing the Erie Canal (*People v. Contracting Board*, 46 Barb. 254). When the officer is allowed a discretion in the matter, the writ will be refused. (*People v. Board*, 27 N. Y. 378.) It has been refused because the officer could decline the bids if he deemed them to be excessive or disadvantageous to the state (*People v. Board*, 33 N. Y. 382); because the officer was only required to let the contract to the lowest bidder if he was responsible (*Hoole v. Kinkead*, 16 Nev. 217), or if he furnished adequate security (*People v. Fay*, 3 Lans. 398); because the contract was to be let to the lowest responsible bidder, and the contract in the case required, for its fulfillment, pecuniary ability, judgment, and skill (*Commonwealth v. Mitchell*, 82 Pa. St. 343); and because in the advertisement the right to reject any and all bids was reserved (*Hanlin v. Independent Dist.*, 66 Iowa, 69, 23 N. W. 268).''

We quote, also, from the following authorities:

It is held in *Douglass v. Commonwealth*, 108 Pa. St. 559, as follows: "In the act of assembly approved May 23, 1874, (P. L. 233), directing contracts for supplies to be awarded to the lowest responsible bidder, the word 'responsible' does not refer to pecuniary ability only. The act calls for an exercise of discretionary powers on the part of the city officers; and if they act in good faith, although erroneously or indiscreetly, *mandamus* will not lie to compel them to change their decision. They may be ordered by *mandamus* to proceed to do their duty of deciding and acting according to their best judgment, but the court will not direct them in what manner to decide. See, also, *Commonwealth v. Mitchell*, 82 Pa. St. 343, as follows: "The word 'responsible' in the 6th section of the act of 23d of May, 1874, has a broader meaning than is involved in the

pecuniary ability to make a good contract by security for its faithful performance, and where the term is applied to contracts requiring for their execution, not only pecuniary ability, but also judgment and skill, the statute imposes, not merely a ministerial duty upon the city authorities, but also duties and powers which are deliberative and discretionary; and therefore, where these authorities have exercised a discretion, *mandamus* will not lie to compel them to modify their decision, even though their action was erroneous, in the absence of clear proof of fraud or bad faith."

It is said in *Kelly v. City of Chicago*, 62 Ill. 282, as follows: "The complainants have merely submitted a proposal to make a certain contract with the board. How do they found upon that a right to have the board make the contract with them? The notice for proposals expressly reserved the right to reject any bid. The charter did not make it the absolute duty of the board to let the contract to the lowest bidder. It provides that 'all contracts shall be awarded by said board to the lowest reliable and responsible bidder.' These qualities of being reliable and responsible, it is obvious, were of the utmost importance in the construction of a work of this magnitude. And the complainants must have been the possessors of these requisites, as well as being the lowest bidders, to make a case of duty on the part of the board to award the contract to them. It was for the board to determine whether the complainants were reliable and responsible. It exercised its judgment upon the question, and found they were not so, and for that reason awarded the contract to another bidder."

See, also, the following from *Hoole v. Kinkead*, 16 Nev. 220: "§ 5 of the statute referred to provides that 'said board may adopt or reject any and all bids not deemed reasonable or satisfactory, but in determining bids for the same work or material, the lowest responsible bid shall be taken.' (Laws 1881, page 59.) The provision that they shall take the lowest responsible bid is mandatory, and they had no power or authority to accept any other; but in ascertaining whether or not

a bidder was responsible they were required to deliberate and decide, and in doing so they exercised judicial, not ministerial, functions. And, in deciding upon the responsibility of bidders, it was their duty to consider, not only their pecuniary ability to perform the contract, but it was their right and duty to inquire and ascertain which ones, in point of skill, ability and integrity, would be most likely to do faithful, conscientious work, and fulfill the contract promptly, according to its letter and spirit. In *Commissioners v. Mitchell*, 82 Pa. St. 349, a case similar to this, and under a statute requiring a contract for stationery, etc., to be given to the 'lowest responsible bidder,' the court thus forcibly expresses itself: 'It is scarcely open to doubt but that the word under consideration ("responsible"), as used in the statute, means something more than pecuniary ability. In a contract such as the one in controversy the work must be promptly, faithfully and well done. It must, or ought to be, conscientious work. To do such work requires prompt, skillful and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even capable of bearing its duty for a time, which in the end may prove to be a total failure, and worse than useless. Granted, that from such a contractor pecuniary damages may be recovered by an action at law. That is, at best, but a last resort, that often produces more vexation than profit,—a mere patch upon a bad job; an exceedingly meager compensation, at best, for the delay and incalculable damage resulting to a great city from the want of a competent supply of water. The city requires honest work, not lawsuits. Were we to accept the interpretation insisted upon by the relators, the difference of a single dollar in a bid for the most important contract might determine the question in favor of some unskillful rogue, as against an upright and skillful mechanic. Again, we know that, as a rule, cheap work and cheap workmen are but convertible terms for poor work and poor workmen, and if the city, for the mere sake of cheapness, must put up with these, it is indeed in a most unfortunate position.' "

We take the following from the syllabus of *People v. Dorscheimer*, 55 How. Pr. 118: "It is provided by chapter 634 of Laws of 1875 (pages 809, 810) that all contracts for work to be done upon the new capitol shall be awarded to the lowest *bona fide* responsible bidder or bidders. *Held*, that the statute requires the successful bidder to be a responsible one,—that is, 'able to respond or to answer in accordance with what is expected or demanded,'—in addition to the giving of the bond for the faithful performance of the contract. He is not to be deemed a responsible bidder because he offers adequate security for the performance of the contract. Where the contracting board has passed upon the pecuniary responsibility of a bidder, and rejected his bid because their conclusion was unfavorable to him in that particular, the court will not interfere, so long as there has been no abuse of discretion."

See, also, remarks of the supreme court of Massachusetts in the case of *Mayo v. Commissioners*, 141 Mass. 74, 6 N. E. 757: "We need not consider whether a private person can maintain a petition for a writ of mandamus to compel public officers to perform their duties, or to direct the manner in which they shall perform them. It is enough for the decision of this case that there has been on the part of the respondents no neglect to perform their duty, and no error in the manner in which they have performed it. County commissioners are not required by law to accept the lowest proposal for public works. The statute provides that all contracts for public works made by them shall, if exceeding \$300 in amount, be made in writing, after notice for proposals therefor has been published at least three times in some newspaper published in the county, city or town interested in the work. Pub. St. c. 22, § 22. It does not provide that they shall accept the lowest proposal. It is clearly the intention of the legislature that the county commissioners, after inviting competition by public notice, shall have the authority to make such contract as in their judgment the interests of the county require. In the case at bar the commissioners fully complied with the statute. If, upon examining the various proposals, they were satisfied

that Mayo, the lowest bidder, was an irresponsible person, unfit and incompetent to perform the work proposed, it was their right and duty to reject his proposal, and to make a contract with some other person, such as, in their judgment, was the most advantageous to the county."

Mr. High, in his work on Extraordinary Legal Remedies, after reviewing the Ohio decisions, says: "The better doctrine, however, as to all cases of this nature, and one which has the support of an almost uniform current of authority, is that the duties of officers intrusted with the letting of contracts for works of public improvement to the lowest bidder are not duties of a strictly ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond control of the courts by mandamus. And the true theory of all statutes requiring the letting of such contracts to the lowest bidder is that they are designed for the benefit and protection of the public, rather than for that of the bidders, and that they confer no absolute right upon a bidder to enforce the letting of the contract by mandamus after it has already been awarded to another. In all such cases the spirit, rather than the strict letter, of the law requiring the work to be let to the lowest bidder, should be kept in view. And where the right of the officers to enter into the contract is itself somewhat doubtful mandamus will not lie. Nor does the mere issuing of proposals, by officers intrusted with letting contracts, inviting bids for the performance of the work, without binding themselves to award the contract to the lowest bidder, create such an obligation on the part of the officers as to entitle the lowest bidder to the aid of a mandamus to obtain the contract. See, also, *State v. McGrath*, 91 Mo. 386, 3 S. W. 846; *Findley v. City of Pittsburg*, 82 Pa. St. 351; *Madison v. Board*, 76 Md. 395, 25 Atl. 337; *State v. Scott*, 17 Neb. 686, 24 N. W. 337; *People v. Contracting Board*, 33 N. Y. 382; High on Extraordinary Legal Remedies, § 48; and also the exhaustive note upon the whole subject found in *Anderson v. Board*, 26 L. R. A. 707.

We quote these authorities simply as to the law as it is ap-

plicable to the case at bar. There are some propositions discussed and decided in them which are not now before us, and upon which we do not express an opinion. We are wholly satisfied, from the authorities, that the state furnishing board in this case had discretionary power. It is the intention of the law that the board shall determine who is the lowest responsible bidder.

Before leaving the law of the case, we observe that it is held by many authorities that bidders other than those to whom the contract is awarded, such as relators here, have no standing in court to compel by *mandamus* the letting of the contract to them. See part of the cases above cited, and 26 L. R. A. 707, and cases.

It has also been urgently argued that the affidavit and writ in this case are insufficient, but these, and some other points raised in this case, we prefer to pass, and reserve an opinion thereupon, and to decide the case upon the merits of the facts as returned by the referee. It is a grave and serious matter if a state board, instead of fairly and honestly awarding a contract, act "wrongfully, arbitrarily, and in disregard of their duty," as charged in relators' affidavit, or act through favoritism and for the purpose of usurping state patronage for personal ends, as argued by relators' counsel. If such a wrongful course is taken by a state board, it appears that there is some method of reviewing it by a court. How such action by a board shall be reached by the court is not necessary to determine. The gravity of the charges against the board in this case has led us to pass all preliminary questions in the case, and to enter upon the merits of the facts.

Having determined the question of law, which we noted above as the first matter for consideration, we will now examine the facts and endeavor to ascertain whether the board acted "wrongfully, arbitrarily, and in disregard of duty," or whether they fairly and honestly exercised the discretion vested in them.

In a case which was relied upon by the relators it is said:

"The learned counsel of appellant has directed most of his argument to this question. The argument against the writ is, in substance, that the statute requires the auditor to examine the proceedings, and satisfy himself that they are legal, before signing; and that if he has examined them, and become satisfied that they are not legal, the most that can be said is that he has committed an error in a matter confided to his discretion, and that the function of the writ is not to review such exercise of discretion. It must be acknowledged that this argument is exceedingly plausible. There are innumerable cases in which it is laid down that *mandamus* cannot issue to control discretion.

The rule, which is undoubtedly correct when properly understood, has been expressed in various forms. It has been repeatedly said that the writ cannot perform the functions of a writ of error; that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions; and that it will issue to compel a tribunal to act in some way, but not in any particular way. These formulas undoubtedly express a truth, but they express it in an inaccurate and misleading manner; and, by reasoning from them as if literally and in all cases true, courts have sometimes been led into error, and have frequently been forced to call acts 'ministerial' which are plainly not so. An examination of the authorities will demonstrate the inaccuracy of the above phrases. Thus it is not accurate to say that the writ will not issue to control discretion; for it is well settled that it may issue to correct an abuse of discretion, if the case is otherwise proper. (*Ex parte Bradley*, 7 Wall. 377; *State v. Lafayette Co. Court*, 41 Mo. 226; *Council of Village of Glencoe v. People*, 78 Ill. 389; *People v. Superior Court*, 10 Wend. 285; *Stockton Railroad Co. v. Stockton*, 51 Cal. 339; Tapp. Mand. 14." Quoted from *Wood v. Strother*, 76 Cal. 545, 9 Am. Dec. 252.

Therefore, let us inquire whether there is a showing in this case of an abuse of discretion by the state furnishing board. After the advertisement for bids, the board met to examine the same; present, a full board. The meeting was commenced

April 4th, and continued to April 5th. All the bids were opened by the board in the presence of the bidders. The bidders then discussed and explained their bids, and their capacity to perform the work. In the order of reference the referee was directed to ascertain what inquiry the board made upon the various points set out in the order of reference. The examination of the witnesses by the relators sought to develop as a fact that the board did not themselves ask questions of the different bidders, and therefore did not make inquiry. But the testimony is that the bidders talked and explained exhaustively. It is a matter of no consequence whether the board obtained their information and facts by asking questions themselves, or whether the information came voluntarily from the persons who possessed the same. In fact, one witness says that at one time the bidders all talked at once, and that the board had nothing to do but to listen.

Mr. Ross, one of the relators, testified that he and his partner, Mr. Eaves, and Mr. Bond and Mr. Monteith, two other bidders, and others, were accorded a full hearing before the board, touching the merits of the several bids submitted, as well as the conditions under which the law required the Codes to be printed.

The governor, president of the board, testified that Mr. Eaves, one of the relators, admitted that he had not as good a plant as some of the bidders, but always fell back on the argument that he could give a bond, which in itself should be a sufficient guarantee of their ability. The governor says that he had information that the relators were not a well-equipped firm, or capable of doing the work. He says he learned that it was a mechanical impossibility for one publishing house to get out the Codes by the 1st of July. He says that Mr. Monteith stated to the board that with the full equipment of the Inter Mountain Publishing Company it would be a mechanical impossibility for their house to get the Codes out without assistance from some other printing house, and that they had entered into an arrangement with a capable printing establish-

ment, and that with their help it would take all the time given by law to do the work. The governor says that he was satisfied by general information that the business and financial ability of the relators were not such as would guarantee the completion of the work. The governor says that he had no commercial reports as to the relators, but he said, "You know, we get our impression of these things as we get our impression of business men and firms generally." He says that the question of the financial responsibility of the relators was frequently expressed in his office while the matter was pending. He says his information was that the relators were one of the smallest printing firms in the state, and that he looked at that as he looked at any business proposition. He states that Mr. Eaves said that his firm could bind books, but they had no thorough bindery.

The attorney general says that Mr. Monteith, of the Inter Mountain Publishing Company, and Mr. Eaves, of the relators, and Mr. Bond, of the Standard Publishing Company, made explanation of their bids, that the board listened, and that questions were propounded, and that the board had a full hearing. The board then adjourned until the next day, for the purpose of inquiring into the ability of the parties to perform the work. They then had before them Judge Wade, and questioned him as to making the annotations. The board heard all the bidders discuss their ability to perform the work, and the conversation was only about the merits of the different bidders. The board paid great attention to the question of the time in which the work could be gotten out, it being required by law that it should be completed by July 1st. The attorney general says the board considered two propositions: First, which of the bidders had the ability to perform the contract; and, second, as to the annotations to be used,—and that the bidders furnished the information and the evidence. Mr. Eaves himself says that Mr. Monteith fully explained his bid, and stated that the attorneys of the state desired the Deering annotations, which annotations the Inter Mountain Publishing Com-

pany proposed to give, while the relators proposed to give annotations by Judge Wade and others.

Mr. Monteith, manager of the Inter Mountain Publishing Company, as a witness, testified before the referee that he had explained his bid, and how it was specific and unequivocal, while the others were ambiguous. He stated that he represented one of the largest printing establishments in the state, and that it would crowd them to complete the work if they entered upon it at once. Mr. Monteith says that the governor, as chairman of the board, stated that the board desired all the information they could get, and that they were arriving at this information through the course of the conversation which they were having at that time. Mr. Monteith said that at the two meetings of the board the chairman stated that they were there for the purpose of hearing the bidders in relation to their bids. Mr. Monteith stated to the board that he had inquired as to the ability of Ross, Frank, and Eaves to perform the labor; that he was informed by printers of Helena that they were incompetent to perform the contract if awarded to them; that they had no stereotype plant; that they had no bindery, and that the capacity of their press was such that it was inadequate for performing the services; that their financial standing was such that supplies were sent to them with the bill of lading attached to the draft, c. o. d. In the the presence of the board Mr. Bond asked Mr. Eaves if they had a stereotype plant. Mr. Eaves admitted that they had none. Mr. Bond asked him if they had a bindery. Mr. Eaves admitted that they had none. Mr. Eaves admitted that they had not yet made arrangements for a stereotype plant, but they had made arrangements for binding. Mr. Bond testified that Mr. Eaves was heard by the board, and set forth the merits of his bid and his capacity.

We do not propose to recite this testimony any further. It covers 263 typewritten pages, as reported by the referee. The most searching examination was made by able counsel into the acts of the board. While we do not pass upon the competency

or incompetency of all the testimony introduced before the referee, we are perfectly satisfied that it appears that the state furnishing board made a diligent and careful inquiry into the skill, competency and ability of both the Inter Mountain Publishing Company and the relators herein. It appears that they considered all the facts and information which they could reasonably be expected to obtain, and that they acted wisely and discreetly, and not arbitrarily and wrongfully, upon the information before them. To say that the board acted wrongfully and arbitrarily and in disregard of duty is wholly unsustained by the evidence. It is to be observed that there was a difference of only \$265 upon a contract of some \$8,000. With this slight difference in figures, and this thorough showing of fair dealing by the board, it would be a remarkable precedent for a court to hold that the action of the board should be disturbed by *mandamus*. It is to be observed, further, that the board did not act hastily. After a sitting of an hour and a half at the first session, the board adjourned without taking action, for the purpose of making further inquiries, and upon reassembling they gave everybody an ample opportunity to be heard.

There is one other matter left for consideration. The relators alleged that the Inter Mountain Publishing Company is disqualified to receive the award of this contract, because Mr. Monteith was a member of the legislative assembly at all times mentioned in the affidavit, and, as relators are informed and believe, is a member of said publishing company, as a stockholder and officer therein, and business manager thereof, actively engaged in the management and promotion of the interests of said company, and as such is interested in the contract.

On the argument made upon the return of the referee's report, relators do not point out to us one syllable of testimony offered by them showing or tending to show that Mr. Monteith held a single share of stock in the Inter Mountain Publishing Company, or that he had one dollar's worth of interest in that concern. Nor have we found such testimony in the report. Upon the contrary, Mr. Monteith testified that he had no interest in the contract, or the proceeds or profits thereof,

and that he had not even a contingent interest in the profits of the publishing company; that he is paid a fixed salary, and always has been; that the obtaining of the contract would not affect his salary in any way whatever; that he has no interest in the Inter Mountain Publishing Company, and did not, at any of the times mentioned, own any of its stock. The only showing of Mr. Monteith's connection with the publishing company is that which was admitted by the pleadings, to wit, that he was and is business manager. But it clearly appears that the obtaining or the losing of this contract would not affect his position as manager, or his salary, in any way whatever.

We have given this case a more lengthy consideration than we at first intended, or perhaps the case deserves. But we have done this by reason of the public character of the acts of the state furnishing board, and by reason of the fact that fairness and honesty must be demanded in the acts of such board; and we believe it a wholesome precedent to inquire closely into the conduct of the board. We have heard the case twice argued, once upon the law and once upon the facts, and we have appointed an able and competent referee to make diligent investigation into the facts. The matter of printing and annotating the Codes is a great public enterprise, which should be proceeded with at once, but should not be proceeded with at all, if, as has been intimated, there was fraud, collusion and arbitrary action by the board. When the time comes that a showing is made of such conduct by the officers of any state institution, and the matter is brought to the attention of this court in a procedure by which it can be reviewed, it will receive a prompt judgment of condemnation.

The writ of *mandamus* is dismissed.

PEMBERTON, C. J. and HUNT, J., concur.

JOHNSON, ADMINISTRATOR, RESPONDENT, v. BOSTON AND
MONTANA CONSOLIDATED COPPER AND SIL-
VER MINING COMPANY, APPELLANT.

[Submitted May 1, 1895. Decided May 13, 1895.]

NEGLIGENCE—Master and servant—Ordinary care.—In defining "ordinary care" the courts recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised.

SAME—Defective boiler—Degree of care required of employer.—The care and attention required on the part of an employer in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as for good.

SAME—Same—Liability of Employer.—In the case at bar the defendant, acting upon the opinion of an experienced engineer as to its capacity, had an old steam boiler, in bad condition, repaired, so that it could be made to answer for temporary purposes in pumping water, where about sixty pounds pressure would suffice, and the boiler was used for such purposes for about six months. It was afterwards placed in the concentrating works of the defendant and connected with the same steam pipe with which larger and stronger boilers were connected, and this was done by the defendant's engineer, who knew of the bad condition of the boiler and that it was not fit to carry more steam than seventy pounds as a maximum pressure. A test of the boiler was made before it was fired, primarily, to see if it leaked and the test was made with only one guage. The plaintiff's intestate was in the employ of the defendant as a boss carpenter, and while in the boiler room in the discharge of his duty, the boiler in question exploded, resulting in his death. *Held*, that the boiler was not such a reasonably safe appliance as the defendant ought to have furnished for use in its works where its employes were exposed, and that the plaintiff was entitled to recover.

SAME—Same—Instruction as to duty of employer.—In an action for damages for the death of an employee caused by the explosion of a steam boiler, an instruction that the defendant "is required to supply its employes with safe and suitable machinery," is not misleading and erroneous, where this rule is qualified by further instructions in the charge, that the defendant is not liable if a defect in the boiler causing the explosion was "latent,—that is, if it could not be discovered by ordinary care on the part of the defendant," and that in providing machinery for the use of his servants the master does not warrant the safety of such machinery, or is he required to see that such machinery is absolutely safe, and "in this case, if defendant furnished such a boiler as a reasonably prudent man would furnish, the plaintiff cannot recover, and your verdict should be for the defendant." (*Kennon v. Gilmer*, 5 Mont. 237, cited.)

Appeal from Second Judicial District, Silver Bow County.

ACTION for damages for causing the death of plaintiff's intestate. The case was tried before McHATTON, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action by Charles M. Johnson, as administrator

of the estate of William O'Connor, deceased, against the Boston & Montana Consolidated Copper and Silver Mining Company, a corporation operating mines at Butte, to recover damages for the alleged negligence in using a boiler, which exploded in November, 1888, and killed the plaintiff's intestate. There was a trial before the court and jury, resulting in a verdict and judgment in favor of plaintiff for \$2,500. The defendant moved for a new trial, and from the order overruling the same, and from the judgment, this appeal is taken. The complaint alleges that the defendant owned and used, in the concentration of ores, the old Colusa concentrator works at Meaderville, in Silver Bow county; that the deceased, about November 19, 1888, was in the employ of defendant at said concentrator as a boss carpenter; that it became the duty of the defendant to procure good and secure boilers with which to generate the steam usually required and necessary to propel and work the engine and machinery used in the said concentrating works; that the defendant carelessly, negligently, and unskillfully provided and used at said works, at said time and place, an unsafe, defective, and insufficient boiler, of all of which it had notice prior to the time of using the same; that for want of due care and attention to its duty in that behalf, on the said 19th of November, 1888, while the said boiler was in use, the said William O'Connor was called upon, in the line of his duty as boss carpenter, to enter the boiler room to inspect certain carpenter work, and that, while he was in said boiler room so inspecting said carpenter work, one of the boilers therein, connected with the engine aforesaid of said works, and in use for generating steam therefor, by reason of its unsafeness, defectiveness, and insufficiency, exploded, whereby said William O'Connor was fatally injured.

The defendant denied any negligence on its part, as alleged, or that it used in the said concentrating works any unsafe, defective, or insufficient boiler, or machinery of any kind, or that, by reason of any carelessness or negligence on its part, plaintiff's intestate was killed. The defendant further answered, and averred that the boilers used to generate steam to run the con-

centrator were good, safe, and sound, and in every respect proper to be used in the works for which they were used at the time the explosion occurred, and were in safe and serviceable condition, and that the engineers in charge were competent, but that, if the deceased was killed by the negligence of any one, it was by the negligence of the engineer in charge at the time the accident occurred, who was a fellow servant of the deceased, and not an agent or vice principal of the defendant, and that if there was any defect of any kind in the boilers defendant had no notice thereof, and was not aware of the same, and such defect, if any, was latent, and could not have been detected or exposed by the most careful and critical examination by competent and skilled engineers and boiler makers.

The replication of plaintiff simply denied that the engineer was the fellow servant of the deceased.

On the trial the plaintiff, to sustain the issues of his complaint, offered evidence tending to prove the following facts: The boiler which exploded had been used at the Colusa mine about four years before the explosion. The defendant moved the boiler out of the Colusa mine house, and put in another boiler instead. After the removal the boiler laid outside of the building for awhile, it is difficult to tell just how long, but about ten months before the explosion the general manager and chief engineer of the defendant company employed a competent boiler engineer to repair it. The object of the repairs was stated to be to run the pump from the creek. The boiler maker, a mechanic of skill and 33 years' experience, whose name was Sloan, said he thought the boiler could be repaired for the purposes suggested, and asked Heimbach, the machinist and engineer of the defendant, how much steam would be required. Heimbach told him about 60 or 65 pounds would run the pump. Sloan told him that there were a couple of sheets that would have to come out, and the flues would have to come out, and be welded and put back. Heimbach told Sloan that all that the boiler would be required to do was to run the pump from the creek. Couch, the general manager,

spoke to Sloan about the boiler, and, when told what was necessary to be done, said that if the boiler would run for six months or a year, he would get a new boiler put on the pump. The repairs were greater than were expected, whereupon Heimbach told Sloan to do the best he could, and after they ran it awhile they would get a new boiler. The iron was old and crystalized. Its tensile strength was partly gone, and there was a scale all the way from one-sixteenth to three-sixteenths of an inch, which would weaken the iron in its capacity to resist pressure. Sloan took the scale out of the boiler. The thickness of the iron was one-fourth of an inch. But this was reduced by the scale, which had cut through from one-eighth to one-sixteenth of an inch. The diameter of the boiler was 40 or 42 inches. Its capacity was 40 horse power. Its length 14 feet. It was single riveted, and 6 to 8 per cent. weaker than a double riveted boiler. The boiler, after several months' use at a pump, was placed between two larger boilers in the concentrating works. The other boilers were five-sixteenths iron, and their capacity nearly double that of the one which subsequently exploded. An examination of the boiler after the explosion showed that it was torn to pieces, the old iron sticking to the new sheets which Sloan put in, the new iron not being torn. The boiler was lying between the two larger boilers. Patches had been put upon the boiler prior to the time that Sloan repaired it. These were not visible after the explosion, by reason of the condition of the boiler.

Sloan testified that the cause of the explosion was that the iron in the boiler was not good enough to stand the pressure that the defendant wanted to put on it; that the boiler was not fit for the place where it was put; that the explosion might have occurred by turning on the steam; and that the boiler was not good enough to go alongside of such boilers as the other two were. When the boiler had been repaired in the December previous to the explosion, it was tested with water, merely to see if it was tight, and was perfectly tight. The general manager was then told that the boiler was good for 60 or 65 pounds of steam. It further appeared that if the steam from

the two new boilers was turned into this old boiler suddenly it would cause evaporation, and a strain equal to the pressure in the boilers on either side, and the old boiler would have to give way because the other boilers were so much larger, or, if the steam from the other boilers was turned on quickly, the old boiler would explode. When the repairs were made on the old boiler, punched instead of drilled holes were made. This fact also tended to slightly bend the fibers of the iron between the holes, which would not have occurred had the holes been drilled. Sloan says also that the work was to be done "as quick as possible, and as cheap as possible," and he was to be directed in part by Heimbach. Sloan testified, further, that when he told the agents of the company that the boiler was good for 60 or 65 pounds, he meant that as a maximum pressure which the boiler would stand, and that the agent said that 55 or 60 pounds would do to run the pump, and for that pressure he considered it perfectly safe. When Sloan finished repairing the boiler it was set up in a pump house, and used to run a pump of compound low pressure, requiring between 50 and 60 pounds of steam. It did not leak while used for pumping purposes, and while it was so used it showed no signs of weakness.

The principal witness for the defendant was A. Heimbach, an employe of defendant, and an expert machinist of 35 years' experience, and, according to his evidence, the boiler was thoroughly repaired by Sloan, and pronounced by Sloan to be "all right." It was tested before it was used for pumping purposes, and after it had served its purpose in that capacity, and before it was put into the concentrating works, it was again tested, and showed no defects, "more than any boiler would have that was used the same number of years." When Sloan commenced to repair it, it was not in a condition to be used for any purpose whatever, and Sloan was directed to cut out what was poor. The last test made, within 30 days before the boiler was put into the concentrating works, was made with cold water, 120 pounds pressure to the square inch, and with a hammer. It was perfectly tight, and the witness thought it

capable of doing the work in the concentrator. The test was not made as to its capacity. He further said that there were boilers in the works as old as the one in question, and that this boiler did the same work that they were doing, as far as its capacity went. "I knew," said the witness, "by the steam connection on the other boilers that it had to be necessarily connected with the same steam pipe, and had been used in the same way as this boiler." The witness denied that he ever told Sloan that if this boiler lasted six months he would get a new boiler. After the hammer and water test had been made by the defendant's agents, the boiler was never used until the day it exploded. Before the boiler was set up in the concentrating works it was scraped out with a scraper, and washed, in the manner usual in cleaning boilers. One gauge only was used in the test.

One witness, an experienced engineer, said that his rule for determining how much a boiler would stand to the square inch was to multiply the thickness of the iron by 56, if it was single riveted, and by 70, if it was double riveted, and multiply that by one-half the internal radius, and divide that by 10,000, which would give a safe load, and that this boiler in question would blow off at 70 pounds, which amount of steam he thought the boiler would carry, and that he considered that he had used worse boilers than that one in Butte. The same witness, Wing, an employe of the company, said that the boiler was carrying 55 pounds of steam about 10 seconds before the explosion, and that there was then no attachment to any other boiler. Pickering, another employe, testified that he had just read the gauge three or four seconds before the explosion. He had been taking up the time through the works, and had seen the engineer standing on a ladder by the boiler. The engineer spoke to the witness, and said, "We will soon have her connected," which statement prompted witness to notice the gauge. The rebuttal testimony of plaintiff was to the effect that the way to ascertain the pressure upon a boiler is to take one-fifth of the tensile strength of the iron, and divide by the diameter of the boiler on 10,000, or one-fifth of whatever the pressure

may be, and the bursting pressure is ascertained. Two gauges are usually used in testing; because one may be wrong, while two should work directly together.

Robinson & Stapleton, for Appellant.

It is an infallible rule of law that where two instructions on a material point in the case conflict, the verdict cannot stand, for that it cannot be known by which the jury was guided. On this point, and as to what courts have regarded as conflicting instructions, see: *Estate of Cunningham*, 52 Cal. 465; *Flick v. G. H. & L. M. M. Co.*, 8 Mont. 305; *Brown v. McAlister*, 39 Cal. 575; *People v. Wong Ah Ngow*, 54 Cal. 154; *Arguello v. Bowes*, 67 Id. 449; *Harrison v. Spring Valley Hydraulic Gold Co.*, 65 Id. 375; *People v. Simmons*, 60 Id. 73; *Chidester v. Con. P. Ditch Co.*, 53 Id. 57; *Kelley v. Cable Co.*, 7 Mont. 73.

Thompson Campbell and D. E. Waldron, for Respondent.

There are no conflicting instructions as urged by appellants. The charge of the court as a whole is entitled to a reasonable interpretation, (*Castle v. Bullard*, 23 How. (U. S.) 172-189,) for the courts have said the jury are presumed to have understood the charge according to the fair import of its terms, when taken together; and it thus becomes a question of construction, to ascertain what the charge really did mean. It is to be considered and construed, as a whole, in the same connected way in which it was given, upon the presumption that the jury did not overlook any portion, but gave due weight to it as a whole; and this is so, although it consists of clauses originating with different counsel and applicable to different failures of the evidence. (*Carrington v. Pac. Mail S. S. Co.*, 1 Cal. 475; *Clark v. McEllery*, 11 Id. 154; *Smith v. Carr*, 16 Conn. 450.) And if when so construed it appears probable, that the jury were not misled by it, the judgment will not be reversed, although its parts may be in some respects slightly repugnant to each other. *Carrington v. Pac. Mail Supra*;

Moore v. Sanborin, 42 Mo. 490; *Karl v. Kan. City R. Co.*, 55 Id. 476-482; *Edwards v. Cary*, 60 Id. 572; *Henchen v. O'Rannok*, 56 Mo. 289.) Or because some of them taken abstractly may have been erroneous. (*Adams v. Nantucket*, 11 Allen 203; *Jackman v. Bowker*, 4 Met. 235; *Mead v. Bowborough*, 11 Cush. 262.) And construing in this way the rule is, as we have already seen, that if the charge states the law of the case correctly and presents the case fairly to the jury, so that they are not misled by it to any erroneous conclusion, any particular error or inaccuracy in it, which, if standing alone would be subject to such criticism will be cured. (*Philips v. Ocmulgee Mills*, 55 Ga. 633.) If, therefore, instructions are found, which state the law incorrectly and yet they are qualified by others in such a manner that the jury were probably not misled, it will not be ground for reversing the judgment. (*Springdale Cemetery Assn. v. Smith*, 24 Ill. 480; *Toledo & C. R. Co. v. Ingraham*, 77 Id. 309.) If a new trial would lead to the same result, the rule is, that the court will not interfere to grant a new trial, where it can perceive from the record, that notwithstanding the instructions complained of, or in the event of the jury having been rightfully instructed the verdict would have been the same; that the jury were bound to find as they did, or that upon a new trial the verdict would be the same. (*Brown v. Bowen*, 30 N. Y. 520; *Boston v. Lawson*, 1 B. M. 46; *Graham v. Bardley*, 5 Humph. 476; *Sheldon v. So. School Dist.*, 24 Conn. 88; *Hewitt v. Jones*, 72 Ill. 218; *Foster v. Chicago & C. R. Co.*, 84 Ill. 164.)

HUNT, J.—The specifications of errors which we will consider, as they relate to the issues before us by the record, are, substantially: (1) Was the boiler which exploded and killed plaintiff's intestate defective and unsafe for the uses and purposes to which it was put by defendant? (2) If it was unsafe or defective, was such condition patent or latent, and did defendant know of such defect or unsafety, or ought it, in the exercise of ordinary care and prudence, to have known of such

defect or unsafe condition? (3) Did defendant use that degree of care required in furnishing and using the boiler for its concentrating works, or was defendant guilty of such negligence in these matters as to render it liable in this action for the death of one of its employes, plaintiff's intestate?

The first question may be easily answered by referring to the proof that the boiler exploded upon the first day that it was put into service in the works. Accepting as true the statements of the defendant's witnesses, that the boiler was carrying only 55 pounds of steam less than 10 seconds before the explosion, and was at that time unconnected with the larger boilers upon either side of it, and was simply being "warmed up," as it is expressed, it is an almost irresistible inference that the terrific explosion which ensued within 10 seconds thereafter, by which the boiler was torn to pieces, was due to a radically unfit condition of the boiler to either carry the steam pressure which was then marked, or the probable increased pressure which was added by increased heat or connections with other boilers within the ensuing seconds. It naturally follows, therefore, that the boiler was unfit for the uses to which it was put (whether or not such uses were or were not reasonable or unreasonable) when the explosion occurred. We will therefore, in the light of the fact of the explosion, pass to the second and third inquiries concerning the defects in the boiler, and the alleged negligence of the defendant.

The boiler was old and in bad condition before repair. Such doubts did defendant have about 11 months before it exploded, of its capabilities, that it seemed to hesitate to make use of it at all, until, in the opinion of Sloan, it could be made to answer for temporary purposes in pumping water, where about 60 pounds pressure would suffice. And it was upon the theory that it was only to be so used, and for about six months that Heimbach, for defendant, directed the repairs to be made. We must attach stress to the brief period of time for which it was said use was to be made of the boiler, because Mr. Couch, the general superintendent, who advised Sloan that a new boiler would be procured in six months or a year, does not specifi-

cally deny that he made such a statement, or that such was the contemplated plan of his company. It is important, too, in adding weight to the whole testimony of Sloan, who says that the boiler was repaired, with the end in view of its use for pumping purposes, independently of any connection with other boilers of greater size, greater strength, and much more recent construction. Heimbach knew of the several patches which Sloan was putting upon the boiler to fit it for temporary service. He knew, as a mechanic and engineer of experience, that an old repaired boiler, once removed from mining works, and for a long time exposed to the impairing causes of scale and crystalization, was weakened generally, and that the iron was less capable to resist pressure than it would have been had it not been covered with a scale of one-sixteenth to three-sixteenths of an inch. He knew the boiler was single riveted, and that the holes made in the iron where the patches were put on were punched and not riveted. He knew, also, that the boiler was not fit to carry more steam than 70 pounds, as a maximum pressure. Yet, with all this knowledge, which was the knowledge of the company in this suit, long after the six months use for pumping purposes had expired, and after additional age and wear and tear had wrought their deleterious effects upon the boiler, the defendant determined to use the boiler in the works, where Heimbach admits it had to be necessarily connected with the same steam pipe that the adjacent and larger and stronger boilers are connected with. It is true that a test of the boiler was made before it was fired. But this test was evidently made, primarily, to see if the boiler leaked. It was made, too, with only one gauge, whereas, it appears, two are more certain, and are commonly used to insure that high degree of accuracy which should govern all boiler tests (particularly old and weakened boilers), but which can only be had where even the possible imperfection of a single steam gauge is guarded against.

So that, notwithstanding the test, we are constrained to conclude, from all the evidence, that the boiler was not such a reasonably safe appliance as defendant ought to have furnished

for use in its works where its employes were exposed. The defects were numerous, and not latent. The case is accordingly quite free from the difficulties often attending the imputation of a lack of that ordinary vigilance and care which ought, in reasonable prudence, to be exercised where dangerous machinery is used. The boiler was altogether so old and defective and weak that it could not perform the service required, and, by reason of the many defects hereinbefore recited, ordinary prudence should have deterred the defendant's servant, Heimbach, from using it at all in the works, or from placing it where a connection with other and larger boilers was to be made.

Now, when we test the conduct of defendant by the standard of duty imposed by law upon all employers towards employes, where steam boilers are used, in respect to the safe condition of such boilers, we are of the opinion that the defendant was negligent.

Jones v. Yeager, 2 Dill. 64, Fed. Cas. No. 7,510, was a case of negligence in a boiler explosion where there was some evidence that the boilers were old in their iron, in some places less than the ordinary thickness, and brittle, and the contention was that the explosion was caused by such defect. The defense, among other matters, was that the boilers had been regularly inspected, according to ordinance, and had been overhauled and put in repair but a few months preceding the explosion. Judge Dillon answers the question of the duty of employers towards employes in such cases in the following language: "This is an important question, and must be carefully answered. The employer does not, impliedly, engage to insure his servants that there shall be no accidents resulting from the use of such machinery. Steam, which is a necessary, is at the same time a dangerous, power, and the danger which attends the use of it imposes upon the owner of machinery propelled by it certain duties and obligations, and these are to use ordinary care and prudence (the degree of this must be proportioned to the danger) to have and to keep the boilers and machinery in a safe and sound condition. If the employer

knows that his boilers are defective, or if, under all circumstances, as a reasonable man, he should have discovered, though he did not, their defective condition, or if he negligently remained ignorant of their defective condition, if the defective condition thereof was the direct and proximate cause of an explosion which injured the servants, who are blameless, and who did not contribute towards the production of the accident by their own fault or neglect, then the law is that the employer is liable to such servants in a civil action for damages thus occasioned." The learned judge says the duties are "to use ordinary care and prudence to have and to keep the boilers and machinery in a safe and sound condition."

The courts have very frequently, within the last few years, been called upon to define the meaning of "ordinary care and prudence." New inventions in steam and electrical machinery have resulted in new occupations for men, and new mechanical appliances whereby their labor is employed. Thus are unforeseen and nice questions of the law of negligence constantly arising as these new relations of employes and employers are discussed and considered by the courts. Familiar underlying principles, evolved from generations of experience and thought, are to be applied to the peculiar phases presented by the facts and circumstances of the particular case under investigation. And so we find the opinions, in discussing the definition of "ordinary care," recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised. The care and attention necessary on an employer's part in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as good.

In a concentrating works, where three large boilers are needed, aggregating about 200 horse power, it requires no technical knowledge to say that many men are necessarily employed about such machinery, and that the dangers and

responsibilities of the owners and of the men employed are great ; hence ordinary care in furnishing suitable boilers for such works would be a much higher degree of care than, for instance, would be ordinary care in furnishing a wagon wherewith to haul the concentrates from the works to a railroad depot or elsewhere.

The circuit court of the United States for the eastern district of Michigan charged a jury in relation to negligence and ordinary care as follows : "You fix the standard for reasonable, prudent and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard ; and neither the judge who tries the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on that subject." (*Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679.) The supreme court of the United States review the instructions in the following approved language : "But it seems to us that the instruction was correct, as an abstract principle of law, and it was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ

upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court." (*Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679.)

The appellant argues that the charge of the district court was not based upon the correct doctrine of ordinary care, as it should have been applied to the boiler used, and complains of the following instruction: "A corporation is required to supply its employes with safe and suitable machinery, and, through its officers and proper servants, make all reasonable efforts and take proper care to keep such machinery in safe and serviceable condition, and to that end make, through its officers and proper servants, all needed inspections and examinations. In this case, if you find from the evidence that the boiler in question was defective and unsafe, and that the officers of the corporation defendant and its proper servants failed to provide a safe and suitable boiler, or failed to make all necessary inspections and examinations to keep such boiler in safe and suitable condition, or, making such inspection and examination, failed to remedy the defects, then you must find a verdict for the plaintiff." The objection goes especially to the law as given requiring the corporation to supply its employes with "safe and suitable machinery." It might be that this statement of the law, without any qualification, would be calculated to mislead a jury into the error of believing that safe machinery means absolutely safe or perfect instrumentalities for the performance of work. Such exact perfection is not the test. The employer is in duty bound to see that the machinery is fit and safe for the work, only so far as due and reasonable care and diligence and prudence will go towards having it, and keeping it, safe and fit. He is not a warrantor of the safety of the machinery, and, when he has exercised the degree of care hereinbefore discussed as ordinary or reasonable, his duty is done. (*Wharton on Negligence* § 211.)

The general principle which must govern is stated as follows

by Justice Lamar for the supreme court of the United States: "Neither individuals or corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances, for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employe or servant." (*Railway Co. v. McDade*, 135 U. S. 570, 10 Sup. Ct. 1044; *Bailey, Mast. Liab.* p. 14; *Wood, Mast. & Serv.* § 329; *Shear & R. Neg.* § 92; *Thomp. Neg.* p. 982, § 11, par. 7; *Coal Co. v. Hayes*, 128 Pa. St. 294, 18 Atl. 387; *Carlson v. Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; *Wilson v. Linen Co.*, 50 Conn. 433.) In *Diamond v. Northern Pacific R. R. Co.*, 6 Mont. 580, the court discuss the principle as applicable to common carriers.

Conceding, therefore, that, as given, the instruction, standing alone, seemed to import a general rule that perfect or absolutely safe machinery was the standard of duty, still we find the qualifications of the rule carefully laid down in other instructions throughout the charge. The jury were told that "a master is never liable for such defects in machinery as could not be discovered with ordinary care, and if you find that the boiler which exploded and killed the deceased, William O'Connor, was defective, and such explosion was caused by such defect, and that such defect in the said boiler was latent,—that is, if it could not be discovered by ordinary care on the part of the defendant,—then said defendant is not liable in damages, and your verdict should be for the defendant." And again, that, "in an action for damages for causing the death of deceased, the burden of proof is on the plaintiff, and he must show that the defendant did not use reasonable care in

procuring for its operations sound machinery, and, if you find that the defendant did use reasonable care in furnishing said boiler for the use of its servants, then you should find for the defendant." The court further charged: "In providing machinery, appliances, or tools for the use of his servants, the master does not warrant the safety of such machinery or tools; he is not an insurer of the fitness of such machinery, and he is not required to see that such machinery or tools are absolutely safe. Nor is he bound to exercise the highest skill, nor to use extraordinary care." "In providing such tools and machinery, he is bound to use only ordinary prudence and care, that the careful and ordinarily prudent man would use under the circumstances. Nor is the master bound to furnish the safest tools and machinery, and in this case, if defendant furnished such a boiler as a reasonably prudent man would furnish, the plaintiff cannot recover, and your verdict should be for the defendant."

When considered as a whole, our opinion is that the law was well and consistently stated, both as to latent and patent defects, and the jury must have had a clear idea of the principles applicable to the issues raised on the trial. To the evidence they applied these rules, and we think their verdict was just. We regard the instructions defining that reasonable care in providing a suitable boiler was the test, as by no means in conflict with the first instruction requiring safe machinery, but as proper limitations put upon the rule stated, and restricting the applicability of the rule within these limitations, which were laid down as qualifications not in conflict with the rule itself. Similar instructions were sustained in *Kennon v. Gilmer*, 5 Mont. 257.

The doctrine of latent defects, as said before, has but little to do with the case. Our view of the matter is that Heimbach knew, or ought, in the exercise of ordinary prudence and care, to have known, that such an obviously defective boiler was unsafe without connections, and fearfully so with connections with other and larger boilers. It was negligence on defendant's part to use such a defective boiler at all in the manner

and place where it was used. Whether connections with the other boilers were or were not made is hard to tell, and, as we look at the testimony, is not of vital importance. It is probable, however, that, directly after the engineer said they were about to connect the boilers, they did so, and the great amount of steam in the larger boilers rushed into the old one, and that it at once exploded by incapability of withstanding the pressure. The element of contributory negligence needs no consideration, for neither the pleadings nor the testimony raise that issue in the case. Nor does the alleged negligence of the engineer as a fellow servant require any discussion, for the defendant offered no testimony to support this plea.

The case is somewhat difficult, on the facts, but our best judgment is that plaintiff is entitled to recover, and that the ruling of the district court must be affirmed.

Affirmed.

DE WITT, J., concurs. The CHIEF JUSTICE, deeming himself disqualified, did not participate in the hearing or decision of this case.

WALSH ET AL., APPELLANTS, v. MUELLER, ET AL., RESPONDENTS.

[Submitted May 2, 1895. Decided May 13, 1895.]

MINES AND MINING—Location of claim—Evidence of discovery of lead.—In an adverse suit to determine the right to the possession of mining property, a finding by the jury that the plaintiff did not discover a lead on the disputed premises on September 15, 1890, with at least one well defined wall and containing valuable deposits of silver, lead and manganese, will be set aside as contrary to the evidence where there was contradicted testimony by plaintiffs that they had sunk a shaft on the ground to a depth of from forty to fifty feet, and, on that date, had discovered a lead about fourteen inches wide in the bottom of the shaft, which contained manganese and quartz and carried silver, lead and iron, that there was a foot wall and that they afterwards sunk four feet in the clear on the lead, there being further testimony by a miner who entered the shaft in the following April that he saw the wall on each side of the lead; that the vein contained manganese and quartz and that the indications were sufficient to justify further work in exploiting it.

SAME—Same—Instructions.—An instruction in an adverse suit which, after defining the dimensions and course of a lawful location, charges, in effect, that if plaintiffs with

knowledge of the direction of their vein, fraudulently located their claim in disregard thereof for the purpose of appropriating surface ground to which they would not have been entitled had they located their claim along the line of the vein, then, even though their location was in other respects sufficient, this fact would render the location void, is reversible error, where no evidence of any such fraudulent purpose was introduced nor would have been admissible under the pleadings.

INSTRUCTIONS.—It is error to give instructions not warranted by the pleadings and evidence. (*Brownell v. McCormick*, 7 Mont. 12; *Kelly v. Cable Co.*, 7 Mont. 70, cited.)

Appeal from Sixth Judicial District, Meagher County.

SUIT upon adverse claim. Defendants' motion for a new trial was denied by HENRY, J. Reversed.

H. G. McIntire and McConnell, Clayberg & Gunn, for Appellants.

The test of a discovery, whether or not it contains valuable mineral deposits, is the willingness of the locator to expend his time and money in further development of the same. (*Shreve v. Copper Bell Mining Co.*, 11 Mont. 309.) It was an abuse of discretion in refusing plaintiffs permission to reopen their case for the purpose of showing the course of the vein in the Haphazzard to be within the side lines of that claim. (*Lisman v. Earley*, 15 Cal. 199; *Barry v. Bennett*, 45 Cal. 80.) Where a location is made the presumption is that the vein extends through the entire length of the claim. (*Patterson v. Hitchcock*, 3 Col. 542, s. c. 5 Col. 542; *Armstrong v. Lower*, 6 Col. 399, s. c. 6 Col. 581.) Instruction No. 8 is hypothetical, not based on any evidence adduced at the trial, nor is it within the allegations of the pleadings. Nowhere do the pleadings allege fraud in the location of plaintiffs' claim. That the giving of hypothetical instructions—not founded on the evidence adduced—is error, is well settled. (*Brownell v. McCormick*, 7 Mont. 12; *Kelly v. Cable Co.*, 7 Mont. 70; *Thompson Charging Jury*, § 62–63.) The instruction is peculiarly prejudicial when it is considered that plaintiffs were prevented from showing by additional testimony their location to be within their side lines.

Toole & Wallace, for Respondents.

Section 262, page 125, Compiled Statutes, prohibits a court from allowing a reopening, except "for good reason, and in furtherance of justice." It has been held that error cannot ever be predicated on such action of the court. (*Williams v. Hayes*, 20 N. Y., 58-60; *Lurrsen v. Lloyd*, 25 Atl. 294). It is questionable whether the offered instruction as to the presumption as to the line of the vein states the law. The last of the two cases cited by appellant (6 Col., 399) says: "We are aware that there is excellent reason and weighty authority for the contrary position of counsel." And the Supreme Court of the United States does not suggest such a presumption, but inferentially would seem to leave it a straight question of fact. (*Iron Silver Co. v. Elgin Co.*, 118 U. S., 207, quoted in 152 U. S., 228.) "For the exercise of this right it must appear that the vein outside is identical with and a continuation of the ore inside those lines." (*Cheeseman v. Iron S. Co.*, 116 U. S., 536). Certainly it could only be applicable to a location regularly made with a valid prior discovery. (*Flick v. Gold Hill Co.*, 8 Mont. 304, 305, which latter case would seem to be unfavorable to any theories of presumption). But assuming that it was free from objection in this respect, it was yet too general in its language in referring to discovery—not even using the words valid or legal, or sufficient in law, or as elsewhere defined to you. Again, the instruction was not applicable to the case. We originally alleged, and on the trial, without objection proved, and the jury by their general verdict may have found, a fraudulent and willful disregard of the line of the vein in making the location, and on this issue the jury was properly charged. (*Larkin v. Dolly*, 53 Fed. Rep., 333, a patent case; *U. S. v. Iron Silver Co.*, 128 U. S., 673, 676; 15 Am. & Eng. Enc. of Law, p. 529, note 2, and 531.) Our contention led to the result that even had the Haphazard a legal prior discovery, and been in other respects a regular location, yet this willful and fraudulent disregard of the vein line would have avoided it, and left its entire surface open to our amended Safety Location. And, under the authorities,

we doubtless could have avoided the location upon a mere willful, and without any fraudulent, disregard of the vein lines. So that the instruction given by the Court was more favorable to plaintiff than he could have asked. But were the disregard merely unintentional, i. e., honestly accidental, the only penalty would be that the side lines would become end lines. (*King v. Amy & Silversmith M. Co.*, 152 U. S., 227, 228; *McClinton v. Bryden*, 73 Am. Dec. 109.) The proofs offered on either side of this case, if all believed by the jury, would have been sufficient to have warranted a verdict in favor of either claim, so far as the size of the vein was concerned. (*Shreve v. Copper Bell Co.*, 11 Mont. 309, 335; *King v. Amy & Silversmith M. Co.*, 9 Mont. 565; 15 Am. & Eng. Enc. of Law, page 530; *Iron Silver Co. v. Cheeseman*, 116 U. S., page 530, (2 McCreary, 191); *Raisbeck v. Anthony*, 72 Wis., 572; *McClintock v. Bryden*, 63 Am. Dec., 110; *Foot v. Nat'l M'ng Co.*, 2 Mont. 404; *Moxon v. Wilkinson*, 2 Mont. 424.)

PEMBERTON, C. J.—Plaintiffs claim to be the owners of the Haphazard quartz lode mining claim, located, as they allege in their complaint, on the 16th day of September, 1890. The said claim is situated in Montana (unorganized) mining district, Meagher county. The complaint alleges that the defendants claim to be the owners of the Safety quartz lode mining claim, situated in the same mining district; that on the 31st day of January, 1891, the defendants made application to the United States land office at Helena, Mont., to obtain a patent to said Safety lode claim; that the premises covered and embraced within and by the said Safety lode application cross and overlap all of said Haphazard lode, and include 6.02 acres of the said Haphazard lode claim; that plaintiffs, within the time required by law, filed their adverse claim to the premises sought to be entered and patented under the name of the "Safety Lode." This suit is brought to try the right to the title and possession of the premises in conflict and dispute. The case was tried to a jury. Certain findings of fact were submitted to and returned by the jury. There was also a general verdict

for the defendants. Plaintiff's filed their motion for a new trial, which was refused by order of the court. From this order this appeal is prosecuted.

Appellants assign as error that finding No. 2 is not warranted by the evidence; in fact, they say that said finding is absolutely contrary to the evidence. Finding No. 2 is as follows:

"Did Walsh and Sweeney enter upon a portion of the unappropriated public lands of the United States prior to the 15th day of September, 1890, and on said 15th day of September, 1890, discover thereon a lead or lode with at least one well-defined wall, and containing rock in place bearing valuable mineral deposits of silver, lead, and manganese? Answer. No."

As to whether a vein was discovered on the Haphazard claim, and when such discovery was made, P. T. Walsh testified as follows: My name is P. T. Walsh. I reside in Neihart. My business is mining. I have been 15 years in that business. My age is 37. I was born in California, and am a citizen of the United States. I am acquainted with the Haphazard mining claim. I am one of the locators of it. I first became acquainted with it when we located it. I did some work on the Haphazard ground before it was located as the Haphazard. I went there the 22d or 23d of August, 1890. I worked about one month after that time. I helped around there a little. I also did a little mining work there. The shaft was on the northeast part of the claim. I began work in that shaft the 22d or 23d of August, and worked about one month. I worked there myself until the night of September 15, 1890. On that night I was working on the upper shaft. Two men were at work there. About 10 o'clock I went up there, and went down in the shaft, and dug it deeper. The more we dug the more we found croppings of the lead. I think we sunk three feet that night,—a narrow trench on this lead. This lead was 14 inches wide. On the east of it the formation was granite. With reference to the creek, the east side is the upper side of the shaft. I think we were down 47 feet when

this lead was discovered. I did not measure it at the time. We then sunk 3 or $3\frac{1}{2}$ feet more. This lead contained manganese, also a little talc. The formation on the east side was the foot-wall of the lead. This lead came through on the east side, and went angling and dipped towards the west. The general course of the vein is a few degrees off of north and south. We sunk four feet in the clear on this lead, when the shaft became dangerous. We then did no further work. We quit work about the last of September. The manganese that I mentioned contained croppings of silver lead ore. The lead matter also carried iron. After making this discovery, we stuck a notice on the claim. We then put up stakes 10 feet in an eastern direction from the shaft, one north of the shaft 12 feet. We measured 300 feet on each side of the northern stake, on the south line of the Compromise ground. We then went to the southwest corner of the Keagan location, and put up a stake there. Six hundred feet to the west we placed another stake. All the places which are indicated on the map we marked with stakes. I do not remember the points as they came, but they are all described in the notice of location. I staked it all around. Patrick Sweeney was with me. After we had done this staking we sent the location notice on the stage to be recorded." He also testifies that very soon after the discovery they quit work until in April, 1891.

Patrick Sweeney testifies as follows: "We struck lead matter in the shaft about 45 feet down. This lead was struck in bedrock, composed, I think, of granite. I do not know what the lead contained, but it was of such a nature that it could be distinguished from the surrounding rock. I was not in the mine at the time the lead was struck. Mr. Walsh was there. We both went down in the shaft. Mr. Walsh was there sinking the shaft. That night I should judge we sunk three feet further. I think the vein was from 12 to 15 inches wide. The work that we were doing was sinking in the shaft. After the discovery the shaft was timbered up. I do not know exactly the course or dip of the lead. It came in the shaft from the west,—from the hill side. I stayed at the shaft that night. I

wrote a location notice, and put a copy of it on a post. We then staked the ground. We put up four stakes at the four corners of the claim. Mr. Walsh marked them, I remember, 'A,' 'B,' 'C,' 'D.' He also put the name of the claim on the stakes. The stakes were driven into the ground, and rocks were piled around them."

Stephen Pierce testifies as follows: "I have worked in the upper shaft on the ground. I worked there September 16th and 17th. At that time the shaft was 40 or 50 feet deep, I should judge. I went to the bottom of that shaft. On the east side of the shaft there was granite. In the shaft lay a ledge of mineral containing manganese, talc, and lead matter. The course of this ledge was north and south. It dips or pitches to the west. The shaft had been sunk some 5 feet on the ledge, and at the upper side of the ledge about $3\frac{1}{2}$ feet. I measured this ledge. It was about 1 foot wide. It contained some manganese, talc, and quartz. The talc was under the ledge at the footwall. This wall was on the east. The ledge carries silver, lead, iron, and I saw some galena there. I am acquainted with the mines of Neihart. The dip of the mines at that place is generally towards the west. I have been engaged in mining in Neihart ever since I came to the town. As these mines increase in depth the character of the same improves."

Thomas Starboard testifies as follows: "I reside in Neihart. My business is mining. I have been engaged in mining since 1870, 21 years or more ago. I am engaged in mining at Neihart. I am foreman in the Monarch mine there. I know the Haphazzard shaft. I was there in April, 1891. I went into it at that time. I went to the bottom. The shaft is about 40 or 50 feet deep. The shaft was timbered to about 5 or 6 feet from the bottom. I saw the lead in the south end of the shaft, 6 or 8 feet up from the bottom. I saw the footwall. I saw the wall on each side of the vein. The vein contains manganese and quartz, with oxidized iron and talc. It was very fair lead matter. The vein pitched to the west. The strike or course of the vein is from northwest to southeast. There was sufficient indication, in my judgment, as a miner, to justify

further work in exploiting this vein. I saw no indication of a drift. There was so much water in the shaft." Starboard examined this mine about the time work was resumed, in April, 1891.

This evidence, we think, shows that the discovery was made on this Haphazard claim on the 15th of September, 1890. A close inspection of the record fails to show that this evidence is contradicted in any respect whatever. We are unable to discover any conflict in the evidence as to when this discovery was made. It is not disputed that a discovery of a vein or lead was made on this claim by plaintiffs; but the respondents contend that it was not made on or before the 15th day of September, 1890. We find no evidence to sustain this contention of the respondents. This is not a question of the conflict of evidence. The contention of appellants is that there was no evidence to justify the finding of the jury under consideration. We think the position of appellants is amply sustained by the record. As this finding is not supported by the evidence, but is directly contrary to all the evidence in the case, we think the court erred in approving it, and denying a motion for a new trial.

The appellants assign as error the giving of instruction No. 8, which is as follows: "The defendants also insist that, even should it be found from the evidence that plaintiffs' location was otherwise sufficient, as based upon a sufficient discovery of a vein whose apex lay within their ground, yet it is void because it was made in willful and fraudulent violation of the law as to surface ground. On this point you are instructed that the act of congress provides that the locator take no more than 1,500 feet in length, nor more than 300 feet in width, on each side of the vein. This contemplates a location to be made nearly parallel with the line of the vein, and if a locator knowing the line and course of his vein, and willfully, and with a fraudulent purpose, locate his claim in disregard of such line and course of the vein, and establish its length, not along the vein, but across it, to an excess of several hundred feet or more beyond the 300-foot limit allowed by congress for the

fraudulent purpose of gaining and appropriating such excess surface ground as his mining claim, this would be in deliberate violation of the law, and a locator so acting could gain no rights whatever thereby, but his location would be absolutely null and void, and he would be left in as bad a position as if one had never been attempted to be made. In this case defendants claim that the line of plaintiff's alleged vein ran in a course practically opposite to the length of their claim as they located it. How this is you will determine from all the evidence before you, but if from such evidence it should appear that such was the case, and that plaintiffs, with the knowledge of the direction of their vein, fraudulently located their claim in disregard of the line of the vein as above defined, then, even though they should satisfy you by a full preponderance of evidence that their location was in all other respects sufficient, yet this fact alone would render location void, and leave them without rights."

There is no allegation in the pleadings that plaintiffs in locating the Haphazzard claim committed, or attempted to commit, any fraud against the United States. There was no evidence introduced to show anything of the kind. If evidence had been introduced for that purpose, we think it would have been error, as there is no issue made by the pleadings that would render such evidence admissible. We think it was error to give instructions that were not warranted by the pleadings and evidence. (*Brownell v. McCormick*, 7 Mont. 12; *Kelly v. Cable Co.*, 7 Mont. 70.

On account of the foregoing errors the order appealed from is reversed, and cause remanded for new trial.

Reversed.

DE WITT and HUNT, JJ., concur.

DUIGNAN ET AL., RESPONDENTS, v. MONTANA CLUB
ET AL., APPELLANTS.

[Submitted April 3, 1895. Decided May 13, 1895.]

16	189
16	318
17	89
17	188
16	189
30	452
16	189
40	550

MECHANICS' LIEN—*Subcontractors in third degree.*—Under section 1391, Fifth Division Compiled Statutes, providing that "all persons furnishing things or doing work as provided for by this Chapter, shall be considered subcontractors," the lien given to contractors by the mechanics' lien law of this state, (Compiled Statutes, 1887.) extends also to subcontractors to the third, or any degree. (*Merrigan v. English*, 9 Mont. 113, approved.)

SAME—*Subcontractors—Protection to owner.*—Under the mechanics' lien law of this state Compiled Statutes, 1887.) the burden is upon the owner to protect himself from the liens of subcontractors with whom he has no direct contractual relations, which may be done by withholding from the contractor such part of the contract price as will protect the property from liens for work or material until the time for filing such liens has expired, or by taking indemnity against such liens.

SAME—*Sufficiency of complaint on appeal.*—A complaint in a lien for foreclosure which does not allege that the materials furnished were used in the building, but which states that the material was furnished to be used in the building, and the notice of lien, which is made a part of the complaint, sets forth the fact that the material was used in the construction of the building, is sufficient on appeal where no objection to the form of the pleading was made in that court. (*Hershey v. Aiken*, 3 Mont. 442; *Murphy v. Phelps*, 12 Mont. 531, cited.)

SAME—*Nonjoinder of defendants—Waiver.*—In a suit by a subcontractor to foreclose a lien, failure to make the original contractor defendant is not a defect which can be raised for the first time on appeal. (*Parchen v. Peck*, 2 Mont. 571, cited.)

APPEAL—*Defective judgment—Costs.*—A judgment erroneous in form will be remanded at respondents' costs, where they have insisted on appeal that the judgment as entered was correct.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to foreclose mechanics' lien. Judgment was rendered for plaintiffs below by BUCK, J. Affirmed and remanded for entry of proper judgment.

Massena Bullard and Thomas C. Bach, for Appellants.

E. A. Carlton, for Respondents.

DEWITT, J.—This action was brought to obtain a judgment for materials furnished one of the defendants, and to foreclose a lien against the clubhouse of the defendant, the Montana Club. There was a judgment for the plaintiffs. The defendant,

the Montana Club, appeals. The appeal is here upon the judgment roll only.

The Montana Club contracted with D. P. Wortman to erect the building. Wortman contracted with William Harrison, and William Harrison with the Helena Co-operative Granite & Sandstone Company, which company contracted with the plaintiffs for supplying certain stone. The plaintiffs are therefore subcontractors in the third degree.

The appellant contends that the lien law of this state does not give a lien to a subcontractor beyond the first degree; that is, beyond the person subcontracting with him who is the original contractor with the owner.

It was decided in *Merrigan v. English*, 9 Mont. 113, (a decision with which we are satisfied) that a subcontractor has a lien in this state. We refer to that case for a careful and accurate analysis of the history of our legislation upon the subject of mechanics' liens. The fact for decision, however, in that case, was only the lien of a first subcontractor. We observe that decisions and text writers have construed that case as holding that subcontractors of all degrees have a lien. While there may be language in the opinion indicating that view, the facts of the case do not extend the decision that far.

We will start in this consideration with the declaration of law, as clearly set forth in *Merrigan v. English*, that the first subcontractor has a lien. The inquiry, then, is, does our law also extend the lien to contractors under the first subcontractor. Appellant's counsel has made a very able argument against that position. We will not restate the history and the law as found in *Merrigan v. English*, but simply refer to that opinion.

Counsel calls our attention to the fact, as noted in that case, and as discussed generally in the decisions and by text writers, that two systems of mechanics' liens are adopted in the different states of the Union,—one, the New York or subrogation system; the other, the Pennsylvania or direct lien system. The system of this state up to 1887 was that of New York.

Since the legislation of that year it has been that of Pennsylvania. See the subject fully developed in *Merrigan v. English*. Counsel then points out that in states holding the New York system a subcontractor of a subcontractor had no lien, citing *Kirby v. McGarry*, 16 Wis. 70; *Harbeck v. Southwell*, 18 Wis. 439; *Wood v. Donaldson*, 17 Wend. 550; *Turcott v. Hall*, 8 Ala. 525; *Stephens v. Stock-Yard Co.*, 29 Ohio St. 227; *Rothgerber v. Dupuy*, 64 Ill. 452; *Berkowsky v. Sable*, 43 Ill. App. 411.

Counsel next argues that, on the reasoning of the decisions in these states, it should also be held that there was no lien to a subcontractor of a subcontractor in this state prior to the law of 1887. But, under both the old law and the new, there is a lien, at least to the first subcontractor. (*Merrigan v. English supra.*) It is also held in *Merrigan v. English* that the change made in the law in 1887, in discarding the New York system and adopting the Pennsylvania system, did not change the classes of persons to whom a lien was given in this state, but changed only the method by which such persons could secure their liens.

But the question now arises, was there not a lien to a subcontractor of a subcontractor under the old law? In the cases which counsel cites from states practicing under the New York system, he does not point out, nor do we find, a statute similar to section 845 of our law prior to 1887, which is the same as section 1391 of the law since that date. That section is as follows: "All persons furnishing things, or doing work, as provided for by this chapter, shall be considered subcontractors, except such as have therefor contracts directly with the owner or proprietor, his agent or trustee." (Comp. St. div. 5, § 1391.) The cases which counsel cites do not construe such a section as this. Those decisions reason upon the applicability of their own statutes, as they find them. There is absent from the decisions of those states a direct statutory declaration as to who subcontractors are; but such declaration we find in our statute, as just quoted. It being conceded under the authority of *Merrigan v. English* that a subcontractor had a lien under the

old law, as well as the new, who is a subcontractor? The statute answers. While it is held by the authorities that, to give a subcontractor of a subcontractor a lien, the declaration of such intention must be very plain and specific, we are of opinion that the declaration of our statute is perfectly clear, and that its meaning cannot be doubted. "All persons furnishing things or doing work" is the language. A subcontractor in the second, third, or any degree is one of the persons "furnishing things or doing work."

Looking further at this statute, the language is "furnishing things, or doing work, as provided for by this chapter." As provided for by this chapter is: "Every mechanic, builder, lumberman, artisan, workman, laborer or other person who shall do or perform any work or labor upon, or furnish any material, machinery or fixtures for any building, erection, bridge, flume, canal, ditch, mining claim, quartz lode, ranch, city or town lots, or other improvements upon land, or for repairing the same, upon complying with the provisions of this chapter, shall have for his work or labor done, or material, machinery, or fixtures furnished, a lien upon such building, bridge, flume, canal, ditch, mining claim, quartz lode, ranch, city or town lots, or other improvements, to secure the payment of such work or labor done, or material, machinery, or fixtures furnished." (Rev. St. 1879, § 820.) Therefore all persons furnishing things or doing work as provided by that chapter are subcontractors. A subcontractor of a subcontractor may furnish things or do work as provided for in the chapter. Therefore a subcontractor of a subcontractor is included by the statute (section 845) as simply a subcontractor.

At this point we notice that counsel for appellants argue, with some reason, that, if the subcontractor of a subcontractor had a lien under the old law, other sections of the chapter on liens seem to be addressed peculiarly to the method of securing and enforcing liens by original contractors and first subcontractors. Whatever force there may be in this suggestion, we are of opinion that it cannot offset the separate and plain and specific definition in the statute of who a subcontractor is. In

fact, we cannot intelligently read section 845 of the old law or section 1391 of the new law in any other manner than a declaration that all persons who furnish the things or do the work are to be considered subcontractors. If we give the construction which counsel contends for to this section, then it would read: "All persons furnishing things or doing work, except second and third and later subcontractors, shall be considered subcontractors, except, again, the original contractor with the owner." But all persons furnishing things, etc., except the second and third subcontractors and the original contractor or contractors, need no definition to define them, for they are first subcontractors without definition. Counsel's interpretation of the section would simply reduce it to reading that subcontractors are subcontractors. We cannot consent to this construction. We cannot hold any other opinion but that under the old law a lien was given to subcontractors of lower degree than the first. It is then important to note that this section 845 was carried into the new laws enacted in 1887, and appears in the identical language as section 1391 of the Compiled Statutes of 1887.

It may be pertinent to observe that section 1391 was enacted by our legislature after many decisions had been made by courts interpreting lien laws to the effect that, to extend the lien to subcontractors inferior to the first, there must be a plain statutory declaration. It would seem that our legislature undertook to make such plain declaration. As noted above, *Merrigan v. English* held that the change made by the law of 1887 was simply from one method of lien to another, and not a change in the classes of persons to whom the lien was given. Therefore, it seems to be clear that subcontractors later than the first are now entitled to a lien under the laws of this state. In this respect there was no error in the district court.

As to the practicable application of such statutes as ours, we note the following from 2 Jones on Liens, § 1305: "Under such statutes, the burden is upon the owner to protect himself from the liens that may be incurred by the person with whom he contracts. It thus becomes incumbent upon him to see that

the contractor is financially responsible for the contracts he may make in the prosecution of the work. His rights are affected only so far as is necessary for the security of those who are presumed to have added something to the value of the owner's property. The owner may always protect himself by withholding from the contractor such part of the contract price as will be sufficient to protect the property from all liens for work or materials. That the owner has paid the contractor before the expiration of the time for filing liens by subcontractors is no defense to such liens if they are filed in due time. The subcontractor is bound to give no other notice of his claim than that required by the lien law."

We also append the following remarks from the case of *Manufacturing Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045: "It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not invalidate the act; for the owner must be held to a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor, and gave out his work with reference to that law. The right of lien to subcontractors and material men is, by operation of law, incorporated into and made a part of the owner's contract, as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the subcontractor and material man in certain contingencies; hence the owner who makes the contemplated contract cannot justly complain of the legal result, especially when he receives the benefit of the labor and material of those for whom the lien is provided, and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing. The second criticism, involving the proposition that the owner *may* be compelled to pay the subcontractor and material man after he has already paid the original contractor, is true literally,

but it is not true in the sense that it ascribes to the statute a *purpose* of enforcing double payment. In other words, it is a fact that an owner who pays the original contractor within thirty days after the completion of the work, building, or machinery, may, upon notice given within that period, be forced to pay the subcontractor and material man whom the original contractor unjustly fails or refuses to pay; but double payment does not follow as a necessary legal consequence in any case. In every instance the owner may fully protect himself by withholding the whole or a sufficiency of the price agreed upon from the original contractor until after the expiration of the thirty days, or he may see to it that the subcontractor and material man are paid as the work progresses, or he may indemnify himself by bond, as prescribed in the third section of this act. It may be truthfully said that it will be inconvenient for the owner to adopt any one of these expedients; yet inconvenience of parties affected is never allowed to defeat a statute. The constitutionality of the act of the legislature cannot be successfully impeached upon the ground that it involves the citizen in mere inconvenience. Much more than inconvenience is involved for the subcontractor and material man. Without the protection of such a law, they would be constantly exposed to the danger of an entire loss of labor and material. Hence, as a matter of pure wisdom and justice, there could be but little difficulty in choosing between the situation with such a law and that which would exist without it. A policy that would involve one class of citizens in mere inconvenience for the pecuniary safety of another class is far more wise and just than that which would suffer loss to the latter class rather than entail inconvenience on the former."

But, notwithstanding these views, we should be inclined to say, if we belonged to the legislative instead of the judicial department of this state, that § 1391 of our lien law, which we have considered, is not wise legislation.

In Phillips on Mechanics' Liens, in discussing the matter of extending liens to subcontractors of subcontractors (in the absence of a direct statute, such as ours, accomplishing such re-

sult), the author says, citing authorities : "There is no policy that would extend its construction to this latter class. If such were the case, the multiplication of liens would become an intolerable nuisance, by allowing distant subcontractors to thus incumber property. It would be intolerable, not only to persons having houses built, but to mechanics themselves; for no prudent man would, with such a law, venture to employ any but rich mechanics about his building, without getting security against liens, which they might multiply with so much facility. How distant, then, may the claimant stand from the contract between the owner and builder before there is no lien? Certainly there must be a limit somewhere. The carpenter may undertake with the builder for finishing all his kind of work, including all the nails, screws, etc. Can he transmit the right of lien to all dealers and artisans in these kinds of business? If he can, then the lien rights against any house may be entirely indefinite. The bricklayer, the stonemason, etc., may multiply them in the same way, until the costs of liens may exceed the value of the house. What, then, is the limit of these lien rights? * * * This would soon be felt as intolerable. To increase the risks materially, as to extend them to journeymen, would be seriously to interfere with the growth and improvement of our cities and towns, by interposing obstacles to the march of meritorious enterprise, and thus eventually to injure the workman himself. For the introduction of such a rule a distinct manifestation of legislative will is necessary. It is far better for all parties to leave the journeyman operative to the security he most commonly relies on,—the personal responsibility of his employer." (§ 60.)

The policy of the legislation in this state has been strongly towards the protection of laboring men, but it is a serious question whether the law in the matter which we are considering has not overreached its object, and injured instead of benefiting the laborer. There is much force in the following remarks on this subject, found in Phillips on Mechanics' Liens : "It would be unsafe in that case for the principal contractor to make any payments or advances to the subcontractors who

had undertaken to do particular portions of the work, until their several jobs were completed, and they had furnished to him conclusive evidence that all the journeymen and laborers employed by them, respectively, had been paid in full; and the various subcontractors would have to raise money some other way to pay such journeymen and laborers, or those who actually did the work would have to wait until the subcontract was fulfilled, so that they and the subcontractor could be paid off by the original contractor at the same time, the probable effect of which would be to suspend the payments of the daily pittance which the journeyman frequently wants for the immediate use of himself and his family, or to compel the great mass of industrious and enterprising mechanics in our cities, who have as yet acquired no capital and but little credit, to become the mere journeymen of a few wealthy contractors, by placing them in a situation by which it would be impossible for them to obtain subcontracts for a part of the work." (Section 49.) But with the enactment of laws we have not to do. We commend the subject to the wisdom of the legislature.

Appellants contend that the complaint does not allege that the materials furnished went into and were used in the building. But the complaint, in the body thereof, alleges that the material was furnished to be used in the building, and the notice of lien, which is made part of the complaint, sets forth the fact that the material was used in the construction of the building. The defendants answered this complaint, and made no issue upon this matter, and thereupon went to trial. They, therefore, cannot raise that question now. (*Hershfield v. Aiken*, 3 Mont. 442; *Murphy v. Phelps*, 12 Mont. 531.)

The same answer may be made to appellants' objection that the complaint does not show at what time the materials were furnished. This is fully shown by the notice of lien.

Again, appellants contend that the complaint does not sustain the judgment, because Wortman was not made a party defendant. But there was no demurrer to the complaint on this ground, and defendants went to trial without any such objec-

tion. (Code Civil Procedure § 87; *Parchen v. Peck*, 2 Mont. 571.)

The only error that we find in the case is in the judgment, which was prepared by plaintiffs' counsel, and entered. Almost as far as that document is intelligible it is wrong. We will not detail its remarkable characteristics, but will set it aside, and remand the case to the district court, with instructions to enter a judgment against the Helena Co-Operative Granite & Sandstone Company for the sums found to be due, as set forth in the present judgment, and the further judgment as to the lien as provided in section 1383 et seq., Compiled Statutes.

As respondents have insisted that the judgment as entered is correct, it is ordered that the costs be taxed against the respondents.

Remanded.

PEMBERTON, C. J., concurs. HUNT, J., deeming himself disqualified, did not sit in this case.

ZICKLER, RESPONDENT, v. DEEGAN ET AL., APPELLANTS.

[Submitted May 7, 1895. Decided May 12, 1895.]

NEW TRIAL—Specifications of error.—On motion for a new trial, in a case where the record is very voluminous, a specification of error which makes no pretense of pointing out, in any way, wherein the evidence was insufficient to establish the breach of a certain condition of the contract, but merely states that "the evidence clearly shows" that such condition had been performed, is inexcusably insufficient, and the court is justified in ignoring such specification. (*Thorpe v. Freed*, 1 Mont. 651; *First National Bank v. Roberts*, 9 Mont. 323, cited.)

SAME—Same.—It was charged by the plaintiff in the action, that the defendants had carried away and secreted ores and had disposed of ores belonging to the plaintiff, and the verdict of the jury in this respect was for the plaintiff. In order to show that this action of the jury was against the evidence, the defendants, on motion for a new trial, specified as error, that the ores alleged to have been carried away were "replied by plaintiff and by him converted to his own use and kept from the possession of the defendants," and "that the only ores disposed of by the defendants, and the moneys received therefor, have been fully accounted for to plaintiff." *Held*, that these specifications were properly ignored, for, if true, the conversion of the ores was practically conceded.

SAME—Same.—It was charged by the plaintiff that the defendants, while operating the

plaintiff's mine under a lease, had attempted to relocate the mine for their own benefit, and the jury so found for the plaintiff. On motion for a new trial, the defendants' specification of error was, "that defendants' partial acts of location, complained of by plaintiff, were performed for his benefit, and for the purpose of protecting their leasehold rights, and were not performed for the purpose of setting up in themselves a title adverse to plaintiff's title, if any title he had. Held, that this specification was properly ignored, as it made no pretense of pointing out the insufficiency of the evidence to sustain the finding of the jury.

SAME—Pleading—Acquiescence.—In an action against the defendant as lessee of a mine for failure to account for the profits thereof to the plaintiff, the claim of the defendant that the plaintiff acquiesced in the former's method of accounting cannot be urged as ground for a new trial, where no facts were pleaded showing any such acquiescence, so as to constitute a waiver.

EQUITY ACTION—Competency of juror—non-prejudicial error.—In an action for equitable relief, the findings of the jury are advisory merely, and the erroneous refusal of a challenge to a juror, who participated in the findings, is no ground for reversal, where such findings were not attacked at all, or, if so, by insufficient specifications of error. (*Leggatt v. Leggatt*, 13 Mont. 130, cited.)

Appeal from Fifth Judicial District, Jefferson County.

ACTION to quiet title to mining premises. The cause was tried before SHOWERS, J. The plaintiff had judgment below. Affirmed.

Ella L. Knowles, for Appellants.

T. J. Walsh, and *C. B. Nolan*, for Respondent.

DE WITT, J.—The defendants appeal from a judgment rendered in favor of plaintiff, and from an order denying defendants' motion for a new trial.

The plaintiff and defendants had entered into a contract in reference to certain mining premises, which contract was, in part, in the nature of a lease from plaintiff to defendants. But in other respects the contract was more than a lease, and in some of its provisions borders closely upon a partnership agreement for the working of the mine. The complaint in the action pleads the contract in full. By that pleading it appears that the defendants had done acts which they had agreed not to do, and had left undone many acts which they had agreed to perform. Defendants were in possession of the premises as lessees of plaintiff, so far as the contract was a lease, but it was set up in the complaint that defendants were claiming the

title to the premises by virtue of a relocation of the same in their own names.

The plaintiff brought this action to quiet his title in and to the mining premises, against all claim of defendants, and for an injunction restraining the defendants from in any manner interfering with the plaintiff's possession of the premises, and from mining or working the same, or extracting ores therefrom, or from removing or disposing of any ore extracted, and for such other and further relief as to the court may seem just. He also asks that possession be delivered to him. Plaintiff alleges breaches of the conditions of the contract in many respects; one of which was that defendant Deegan, who was manager and superintendent, had failed to account to the plaintiff and Thomas Moran, the other defendant, each month, in accordance with the terms of the contract. The contract particularly set forth the time when and the manner in which the accountings should be made.

On motion for new trial the defendants made the following specifications of error: "The evidence clearly shows that the defendant Ross Deegan accounted to the plaintiff and defendant Thomas Moran each month in accordance with the terms of said lease." This court has not, of late, often criticised specifications, and has been decidedly lenient in entertaining appeals where the specifications were perhaps not wholly what they should be. But this specification above quoted is inexcusably insufficient. (*Thorp v. Reed*, 1 Mont. 651; *First National Bank v. Roberts*, 9 Mont. 323.) There are over 300 pages of record in this case, and this specification makes no pretense of pointing out, in any way, wherein the evidence is insufficient. The specification is little more than a repetition of the statement of a ground for a motion for a new trial, as required to be set out in the notice of the motion. The district court was justified in ignoring this specification.

Another matter set up in the complaint was that the defendants took and carried away and secreted about \$5,000 worth of ore, when the contract provided that all ore should be accounted for. As to this matter defendants specify insufficiency

of the evidence, as follows: "The evidence clearly shows that the identical ores claimed by plaintiff to be of the value of about \$5,000, and to have been taken by defendants with the intent to fraudulently defraud plaintiff of his interest therein, were replevied by plaintiff in a suit in the district court of the First judicial district, and have by him been converted to his own use, and kept from the possession of the defendants herein." This specification is remarkable. The defendants being charged with misappropriating \$5,000 worth of ore, they say that the evidence did not sustain the charge of the plaintiff in this respect, for the reason that the \$5,000 worth of ore claimed to be appropriated by defendants was not appropriated, because the plaintiff, in order to prevent a final conversion by defendants, took and obtained the ore by the legal adjudication of a court. It is a matter of course that the district court was justified in ignoring such a specification.

It was also charged by plaintiff that ores had been disposed of by defendants. In order to show that the verdict of the jury in this respect was against the evidence, the defendants specify as follows: "That the only ores disposed of by the defendants, and the moneys received therefor, have been fully accounted for to plaintiff." This is the same sort of an insufficient specification as the first. One provision of the contract was that, if defendants made any discoveries of ore, they should not locate said discoveries for themselves, but that, if they were located, it should be in the name and for the benefit of the plaintiff. One of the charges made by the complaint was that the defendants had located, or attempted to locate, the premises in their own name, in order to deprive plaintiff of his title therein. It was claimed by plaintiff that the defendants, in the language of miners, jumped the plaintiff's claim while they (defendants) were in possession for the plaintiff. What the result of such an attempt would or could be we need not determine, but need notice only the findings of the jury, and the specification of insufficiency of the evidence in this respect. Upon this question the jury made the following findings:

“(1) Did the defendants, at the time they posted the notice of location, and marked the boundaries of the Freiburg Mine, intend to secure title to said ground for themselves? Answer. Yes.

(2) Did the defendants, at the time they posted the notice of location, and marked the boundaries of the Freiburg Mine, intend to convey to plaintiff such rights as might arise from such posting of notice and marking of boundaries? Answer, No.” The defendants’ specification of error upon this point is as follows: “That defendants’ partial acts of location, complained of by plaintiff, were performed for his benefit, and for the purpose of protecting their leasehold rights, and were not performed for the purpose of setting up in themselves a title adverse to plaintiff’s title, if any title he had.” This specification is simply a very brief syllabus of that issue, as set up in the pleadings. One question for decision was whether the defendants attempted to relocate the mine for their own benefit, or for that of the plaintiff. The jury found against the defendants in this question. Their specification makes no pretense of pointing out wherein the evidence was insufficient to sustain this finding. The two findings which we have recited above are the only special findings. There is also a general verdict in favor of the plaintiff, and that he is entitled to the possession of the premises.

It is also specified that the verdict is against the law, because the plaintiff acquiesced in Deegan’s method of accounting, as defendants call it, or failure to account, as plaintiff claims it was. But there was no pleading of any such acquiescence, so as to constitute a waiver, as the defendants claim.

There is a long list of assignments of alleged errors of law, many of which were as to matters of discretion in the district court, most of which are frivolous, and most of which are not discussed by appellants’ counsel at all, and none of which are of such a substantial character as to reverse the judgment and order.

There is one matter, however, to which we must give atten-

tion. This is the alleged waiver of one of defendants' peremptory challenges. It is argued by respondent that the question is not properly raised by the record. We will pass that question of practice, however, and notice the alleged error. The record shows the following: 'During the selection of the jury, counsel for defendants states: 'We waive our second challenge.' Whereupon counsel for plaintiff peremptorily challenges one of the jurors then in the box. The court then gives counsel for defendants the privilege of exercising his third challenge against the last juror that entered the box. Counsel for defendants peremptorily challenges Lees Taylor, a juror in the box at the time defendants waived their second challenge, which challenge is overruled by the court, and to which ruling of the court counsel for defendants hereupon duly except.'

This seems to be an equity action, or an action for the equitable relief for quieting the title of plaintiff, and enjoining the defendants in the respects as set forth in the opening portion of this opinion, and for such other and further relief as to the court may seem just. The plaintiff was in the possession of the premises by his tenants, the defendants (section 366, Code Civil Procedure), so far as the defendants may be considered tenants; or, so far as the contract was in the nature of a partnership, plaintiff and defendants were each in possession. If one were required to strictly classify this action under the old forms, possibly some difficulties might be encountered. Indeed, there are some peculiar features in the case. But they are not raised by the record. In any event, it is true that the case has been treated by counsel and the district court as one for equitable relief. Certainly equitable relief was demanded, and was granted, and was the main, if not the only, object of the action. As the equitable character of the action has never been questioned, and seems at all times to be conceded, we feel justified in adopting that view. The question, then, is presented whether, in an action for equitable relief, the findings of the jury being advisory, there was prejudicial error in refusing to allow the defendants to peremptorily challenge juror

Taylor, as set forth in the extract from the record above quoted.

In the case of *Leggatt v. Leggatt*, 13 Mont. 190, we said: "The appellant contends that his challenge for cause to juror Heilig should have been sustained. But, if this were error, it is not now material, because the findings were advisory, and were adopted by the court, and are now attacked." The case at bar, in this respect, is precisely like the *Leggatt* case, with the slight difference that in the *Leggatt* case the findings were not attempted to be attacked. Here, as in the *Leggatt* case, the findings were adopted, and judgment entered thereupon. Also in this case the findings are not attacked,—that is, not attacked in any manner by which this court can notice the objections thereto,—for the reason that error is not specified so that it can be considered. Therefore the findings are the facts of the case. Therefore, if the findings are the facts, not impeached in the method provided by law, there can be no prejudicial error in the refusal of a challenge to a juror who participates in the findings which are now the unquestioned facts of the case; for, suppose it were held that the refusal of the challenge to juror Taylor was error, still, how can the appellants be injured, when it is conceded that the findings of the jury, adopted by the court, are, in the absence of assignment of error, the facts of the case?

We find no reason for disturbing the judgment or the order appealed from, and the same are affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

LEGGATT, APPELLANT, v. PRIDEAUX, RESPONDENT.

16 20
20 491

[Submitted May 6, 1895. Decided May 20, 1895.]

OFFICERS—Justice of the peace—Illegal fees—Ignorance of the law.—A justice of the peace collecting excessive fees is liable in an action for the statutory penalty without regard to any corrupt motive or intent in collecting them. His ignorance that the fees were illegal does not excuse him. Neither would the fact that the person paying the fees knew that they were excessive and kept silent, nor the fact that upon discovery of the mistake he tendered back the fees, constitute any defense to the action.

SAME—Illegal fees—Voluntary payment.—Where the statute in such case imposes the penalty for receiving the illegal fees, the question as to whether payment by the litigant was voluntary or not, is immaterial.

Appeal from Fifth Judicial District, Beaverhead County.

ACTION to recover statutory penalty for collecting illegal fees. Judgment was rendered for the defendant on the pleadings by SHOWERS, J. Reversed.

Statement of the case by the justice delivering the opinion.

This action (consisting of two actions consolidated) is brought by plaintiff under section 9, page 241, Laws 1891, against defendant, who was a justice of the peace, for recovery of ten times the amount of certain fees received by the justice, not specifically provided for by law. The section referred to declares: "That the fees and salaries in this act provided shall be all the compensation by law allowed such officers, for all services which they are required to or by law can perform as such officers. Any such officers who shall receive any fee, or reward, or salary not specifically provided for by law, shall be liable to the county, state or persons paying the same for ten times the sum so paid to such officers, to be recovered by civil action, and shall be deemed guilty of a misdemeanor, and on conviction shall be fined in any sum not less than one hundred nor more than five hundred dollars, and shall be imprisoned in the county jail for a term of not less than thirty nor more than ninety days."

The defendant admitted the excessive charges, but relied

upon (1) ignorance of the law; (2) that plaintiff well knew that the fees were excessive, and wilfully kept silent, and permitted the said charge to be made for the bringing of this suit, when, if he had informed defendant of such excessive charge, defendant would have gladly reduced his charge to the legal limit; (3) that prior to a demand, he discovered the mistake, and immediately tendered the amount of the excessive charges, but plaintiff refused the same.

Plaintiff replied, denying any tender of the amount of illegal fees. Counter motions for judgment on the pleadings were made. The court sustained the defendant's motions, and granted judgment, dismissing plaintiff's complaint, and awarding costs to defendant. The action of the court in sustaining defendant's motion for judgment is assigned as error.

W. S. Barbour and Smith & Word, for Appellants.

Fees thus extortionately exacted can be recovered in a civil suit even before the officer has been convicted in a criminal action, and such statutes providing a penalty for extortion of illegal fees by officers are constitutional. (*Ming v. Truett*, 1 Mont. 322.) In the respondent's answer he admits the taking of the fees, as alleged in the complaint, but pleads in excuse thereof ignorance of the law. Such a plea is untenable and is no defense to the action. Ignorance of the law will not excuse the taking of illegal fees. (*Coats v. Wallace*, 17 Sargent & Rawle, 75; *People v. Monk*, 28 Pac. Rep. 1115; 3rd Greenleaf on Evidence, § 21; 11th Neb., 157; 8 N. W. Rep., 386.) The courts have no power to inquire into the policy of the law. The legislature enacts the law, and it is the duty of the courts to construe it, and if constitutional, to enforce it, regardless of the expediency. (*State of Nevada v. Parkinson*, 5 Nev. 17; Cooley's Constitutional Law, 197-201, 6th Edition.)

Cullen & Toole, for Respondent.

It cannot be successfully contended in view of our statute

- requiring joint operation of act and intention and of act and criminal negligence to constitute an offence, that our legislature ever intended to disgrace a citizen for doing that which he honestly believed he had a right to do. This proposition is sustained with much force in the following cases. (*Cutter v. State*, 31 N. J. Law Rep. 125; *People v. Whaley*, 6 Cowen 661; *Commonwealth v. Shed*, 1 Mass. 228; *People v. Harris*, 29 Cal. 682; *State v. Gardner*, 5 Nev. 312.) This action is brought under section 9 of an act entitled "An act concerning compensation of county, district and township officers." While the body of the act is constitutional, we contend that section 9 is not, because the title thereof makes no reference to a "penalty" or "punishment." (§ 23, Article V., Const. of Montana.)

HUNT, J.—The first question presented is whether a justice of the peace who collects fees exceeding those allowed him by law, is liable in a civil action for a penalty of ten times the amount of such fees, without regard to any corrupt motive or intent in collecting them. The facts of this case show an admitted violation of the letter of the law, and a *prima facie* liability under its provisions. (*Lydick v. Palmquist*, 31 Neb. 300.)

That the justice of the peace believed he had a legal right to charge the fees he did, and acted in good faith in taxing and collecting the fees, constitute no defense. It would be most dangerous to the welfare of society if an officer elected to administer the law could violate it to his own pecuniary advantage, and escape the consequences of his act by pleading ignorance of the statute he had violated.

That ignorance of the law is no excuse is a postulate of law, but, unless the maxim is upheld, there would be innumerable problems presented to courts, and he who knew the least might fare the best; or, as is said by the supreme court of California (*People v. O'Brien*, 96 Cal. 171) "the denser the ignorance the greater would be the exemption from liability."

The case is not one where there was a mistake of fact. The

court of appeals of New York, in *Gardner v. People*, 62 N. Y. 299, say: "Such mistakes do not excuse the commission of prohibited acts. The rule on the subject appears to be that in acts *mala in se* the intent governs, but in those *mala prohibita* the only inquiry is, has the law been violated?" (*People v. Brooks*, 1 Denio 457; *Beckham v. Nacke*, 56 Mo. 546; *Commonwealth v. Emmons*, 98 Mass. 6; *Carr v. Trainor*, 36 Ill. App. 587; *Roberge v. Burnham*, 124 Mass. 277; *People v. Monk*, 8 Utah 35, 28 Pac. 1115.)

The receiving of the illegal fees is the gist of the wrong under the statute, and, when such fees are deliberately accepted, the law is violated, and the liability attaches.

No less eminent a judge than Chief Justice Gibson of Pennsylvania, in an early case (*Coates v. Wallace*, 17 Serg. & R. 75), wherein a justice of the peace was sued for a penalty in having exacted illegal fees, wrote as follows: "The penalty imposed by this act may be incurred by exacting fees which are supposed at the times to be legally demandable. By the very words of the prohibitory clause, the taking is the gist of the offense. Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him with an unusual attention to clearness and precision. On any other principle a conviction would seldom take place, even in cases of the most flagrant abuse, for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril; and we are of opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids."

The case of *State v. Gardner*, 5 Nev. 377, relied upon by respondent, was a criminal action, where the defendant, who confessedly had no criminal intent, was indicted and convicted of a felony in violating a law for improperly issuing licenses.

A majority of the court held that a criminal intent was a necessary ingredient of the offense charged, which was a felony, not a misdemeanor. And the opinion, when scrutinized, is based upon the ground that in considering the fearful consequences imposed if a mere violation of the letter of the law would necessitate a conviction, it was impossible to believe that the general rules of the criminal law requiring an evil intent were to be ignored. The case therefore differs from the one at bar. We note, too, that the Nevada ruling is not generally approved of. The court of appeals of New York, in criticizing the opinion, say: "It is evident that a majority of the court struggled to relieve the defendant from a harsh punishment for a comparatively innocent act." (*Gardner v. People, supra.*) The supreme court of California also decline to follow it. (*People v. O'Brien, supra.*)

The defense of the silence of the appellant, Leggatt, in not informing respondent of the fact that his fees as justice were excessive, cannot obtain. The very statement of the proposition that an unsuccessful litigant is bound to advise the justice who had decided against him what the law is, illustrates the absurdity of the contention.

The respondent next argues that a tender back, when he discovered his error, should relieve him. We cannot agree with him. To so hold would be to practically nullify the whole object of the law by permitting officials who violate its provisions to escape the consequences by refunding, when their extortions were detected, or when they believed they were about to be detected. The effect would be to say to officials, "You may charge and retain all the illegal fees you can collect, and, if by chance you are discovered in taxing illegal sums, you need only refund to avoid all penalties for your errors or wrongs." This would not do. (*Turner v. Blount*, 49 Ark. 361, 5 S. W. 589.)

Finally, respondent says that the payment of the excessive fees by the appellant was a voluntary one, and for that reason he cannot prevail in this suit. We seriously doubt the correctness of the contention that a payment is voluntarily made

where a judgment is rendered and costs are taxed against a party to a suit, and paid by him in obedience to a demand by the justice who rendered the judgment, and who alone could issue process to enforce its collection. (*Steamship Co. v. Young*, 89 Pa. St. 186; *Insurance Co. v. Britton*, 8 Bosw. 148-155; *McKee v. Campbell*, 27 Mich. 497.) It is unnecessary to pass on the question, however, because we think the doctrine of voluntary payment is not properly applicable to this case. The statute of itself is too plain a guide. The respondent, a justice of the peace, demanded and received excessive fees. The law was explicit in fixing his compensation, but he violated it. The same statute which fixed his fees said to him, "If you violate this law by receiving illegal and excessive fees, the person who pays them to you may recover ten times the sum so paid to you; primarily as a penalty upon you, and incidentally as a remedy to him." (*Lane v. State*, 47 N. J. Law 362, 1 Atl. 476.)

We find nothing in the answer which demands any further construction of the statute, the main objects of which are to prevent extortion and imposition. The respondent pleads no fraud or deception on the appellant's part, except that, in order to bring this suit, appellant kept silent, and did not advise him what the law was. But, as said before, there is no obligation upon a litigant to advise a magistrate what his official fees are. He is naturally expected and bound to know them himself; and where his charges exceed the amount the law allows him he cannot escape the statutory responsibilities imposed, either because his extortion was the result of his ignorance, or because the victim of his extortion was more learned, yet failed to counsel him upon the law. It is possible that the enforcement of the penalty in this case is a hardship, and it may be that the severity of the law is great; but with those matters we have not to do. The policy upon which the statute is founded is none the less wholesome; and while, in administering the law, cases occasionally arise which, under certain circumstances, constrain courts to render harsh judgments, yet, in the lapse of time, a due respect for the rigid

maintenance of sound principles will prevent the growth of systems of great wrong to the public generally. Being of the opinion that, as the pleadings stood when the counter motions were made, the plaintiff was entitled to judgment, it follows that the judgment of the district court must be reversed, and it is so ordered.

Reversed.

PEMBERTON, C. J. and DE WITT, J., concur.

HIRSCHLER ET AL., APPELLANTS, v. McKENDRICKS,
RESPONDENT.

16 211
25 267

[Submitted May 8, 1895. Decided May 20, 1895.]

MINES AND MINING—Proof of annual representation.—In an action to quiet title to a mining claim where plaintiffs sought to prove the performance of one hundred dollars worth of labor on the claim, as required by section 2324, United States Revised Statutes, before defendant's relocation, a finding of the jury under defendant's testimony that the value of such work was but seventy-five dollars, will not be disturbed on appeal where plaintiffs barely proved the performance of the required work, if at all, under the best view of their own testimony.

SAME—Annual representation—Sharpening picks.—When the expense of sharpening picks used in representing a mining claim is sought to be proved as an item toward making up the required one hundred dollars worth of labor or improvements, the exclusion of the evidence is proper where counsel refused to inform the court, though requested so to do, as to whether he wished to show that the picks had been sharpened on the mining premises or before they were taken there.

SAME—Resumption of work to prevent forfeiture.—Where work is resumed upon a mining claim to preserve the same from forfeiture for failure to represent, it should be prosecuted with reasonable diligence until the requirements for annual labor and improvements have been obeyed. (*Hinaker v. Martin*, 11 Mont. 91, followed.)

SAME—Resumption of work—Proof of reasonable diligence.—The resumption of work by plaintiffs upon a mining claim, before a relocation, for the purpose of preventing a forfeiture for failure to represent, as permitted by section 2324, Revised Statutes of the United States, cannot be held to have been prosecuted with due diligence, where it appeared that fifteen days prior to relocation by defendant, plaintiffs had, without any apparent reason, and without having completed the requisite one hundred dollars worth of labor or improvements, ceased all work upon the claim; that after the last work had been done they posted a notice soliciting proposals for five hundred dollars worth of work, but it did not appear, however, whether the notice was posted before or after defendant's relocation.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to quiet title to mining property. Plaintiffs' mo-

tion for a new trial was denied by BUCK, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This action was brought by plaintiffs to quiet their alleged title to certain mining premises. They claim the premises under the location of the Rose Cleveland claim. The defendant was asserting title to the ground under the location of the Clements claim. The Rose Cleveland was located by plaintiffs' predecessors January 1, 1889. The Clements was located by defendant January 30, 1891. Plaintiffs did not represent the Rose Cleveland in 1889 or 1890. Defendant claimed a forfeiture on the part of plaintiffs by reason of such nonrepresentation. We use the word "representation" as the popular term employed by miners to indicate the annual accomplishment of \$100 worth of labor or improvements upon a mining claim. (Rev. St. U. S. § 2324.)

Plaintiffs defend against the forfeiture by allegation and attempted proof that, prior to the location by defendant, they (plaintiffs) had resumed work upon the claim after failure, and before relocation. (Rev. St. U. S. § 2324.)

The case was tried upon the issue of whether the plaintiffs had in good faith, and with reasonable diligence, resumed work upon the Rose Cleveland before the relocation of the ground by the defendant as the Clements. The findings of the jury in this respect were generally and in detail against the plaintiffs. Judgment was entered in favor of defendant, quieting his title in the premises as to the Clements lode. Plaintiffs' motion for new trial was denied. From that order and the judgment, they appeal.

Alex. C. Botkin and Theodore Shed, for Appellants.

J. M. Clements, for Respondent.

DE WITT, J.—As to the construction of the words "resuming work," as found in section 2324, Rev. St. U. S., we will not again review the decisions. We are satisfied with the con-

clusion reached in *Honaker v. Martin*, 11 Mont. 91, as announced in the opinion by Mr. Chief Justice Blake. In that case, after reviewing the authorities, the court said: "When, therefore, he availed himself of the statutory privilege of resuming work to preserve his estate from forfeiture, we hold that he should have prosecuted the same with reasonable diligence, until the requirement for the annual labor and improvements had been obeyed."

In the case at bar forfeiture for nonrepresentation in 1890 is conceded. The question remains whether, when the relocation was made by defendant (January 30, 1891), plaintiffs had resumed work in good faith, and prosecuted the same with reasonable diligence to or towards the accomplishment of \$100 worth of labor performed or improvements made.

Two contentions are made by plaintiffs: First, that they had actually accomplished \$100 worth of labor or improvements before the relocation; second, that, if the \$100 worth of labor or improvements was not completed, they were at least advancing towards such completion with due diligence when the relocation was made. We will take these propositions in their order.

1. Plaintiffs introduced testimony that two men, Langan and Walsh, for them, resumed work on the night of December 31, 1890, and worked until morning. Commencing again January 2d, these men performed six consecutive days of labor. This aggregated seven days for two men, or fourteen days of labor, which at \$3.50 per day (the ordinary miner's wages), and with a little extra compensation for the nightwork on the 1st of January, footed up a total of \$25 for each man, which was paid to them, and which was a reasonable compensation. A miner by the name of Huggins, employed by the other owner in the Rose Cleveland, it appeared, worked ten days in January before the relocation. This, at \$3.50 a day, would equal \$35. There was also evidence by plaintiffs tending to show that three men (McDonald, Baatz and Dulah) worked a day each in December, 1890, at \$3 per day, which would be \$9. At plaintiffs' estimate of this labor, they would

have \$94 to their credit in labor performed and improvements made. It was also claimed by plaintiffs that some logs were cut for a cabin before the relocation. Testimony upon this question was quite indefinite, and the value of this work, if any, was exceedingly small. The cross-examination upon this point did not leave the proof at all satisfactory that there was any substantial value in this labor or improvement.

It is sufficient to state that plaintiffs were obliged to push the value of their labor and improvements to the very extreme to reach the \$100 mark. They barely reached that mark, if at all, under the best view of their own testimony. On the other hand, the defendant called a number of experienced miners, who had examined the results of the labor alleged to have been performed by plaintiffs in resuming work. They testified as to the reasonable expense of making the excavations which they had examined, and as to which plaintiffs' witnesses had testified. They testified as to how long it would take to do such work. Their testimony cut down the value of plaintiffs' labor to a point from \$14 to \$36 less than plaintiffs estimated it. The jury found that \$100 worth of labor or improvements had not been made before the relocation, and that the value was only \$75. We think that under these circumstances, when the plaintiffs were straining every point in their testimony to reach an estimate of \$100, and when it was doubtful that they had reached such figure, even in the best view of their own testimony, and when defendant's testimony reduced the value far below \$100, the finding of the jury that the value was \$75 should not be disturbed.

The plaintiffs offered testimony as to the expense of sharpening some picks, which it was claimed Huggins used in prosecuting the work upon the claim. This evidence was excluded by the court, and error therein is assigned. It may be that there are circumstances that would justify charging the expense of sharpening picks as part of the costs of representation. We are quite sure that there are other circumstances where such expense could not be allowed as part of the representation work. But in this case we do not think we need in-

quire into the competency of this testimony, for the reason that it appears by the record that the court, for its own enlightenment, several times asked counsel to inform the court whether he wished to show that the picks had been sharpened on the mining premises which were being worked, or whether they had been sharpened before they were ever taken to the premises. The record further shows that counsel refused to enlighten the court upon this subject, whereupon the court excluded the evidence offered. It seems that the court, by this inquiry made of counsel, was endeavoring to ascertain whether the sharpening of the picks was such an expense as, under all the circumstances, should have been allowed. If the sharpening of picks was a legitimate expense, we cannot understand why counsel did not respond to the inquiry of the court, and give the information requested. As counsel chose to give no explanation, and state no facts which would enable the court to rule intelligently upon his offer of testimony, we think the court was justified in excluding the evidence.

2. We now come to the second contention of appellants. They claim that, if they had not completed the \$100 worth of labor or improvements, they did show that they were prosecuting such labor with due diligence towards the completion of said \$100 worth of labor when the relocation was made by defendant. But the jury found, and, as we think, was sustained by the evidence, that the plaintiff had ceased all work upon the claim for 15 days before relocation. It does not appear that they were obliged to cease labor by the inclemency of the weather, or the rigor of the season of the year, or for any other reason. They had been performing such labor up to the middle of January, and no reason appears why they could not have continued such labor for the last half of January, as well as during the first half. But the contention of plaintiffs is that they were continuing labor in good faith and with due diligence, because they took steps towards the letting of a contract for the performance of \$500 worth of work for the purpose of obtaining a patent. The plaintiffs offered to show that when Huggins quit work, about the 14th of January, they

posted a notice soliciting proposals for \$500 worth of work, with a view of obtaining a patent for the premises, and that certain parties negotiated with plaintiffs with a view of taking such contract, and went upon the ground for that purpose, but that, on account of the relocation of the claim, they refused to perfect the contract or proceed with the work. The testimony so offered was excluded. We can understand how the diligent attempt to secure the performance of \$500 worth of work might, under proper circumstances, be due diligence in resuming and continuing labor upon the claim, but we do not think that the testimony offered in this case was evidence of such diligence. The most that was offered to be proved was that plaintiffs had posted up a notice soliciting proposals. The offer does not state even when they posted this notice, whether before or after the relocation. The offer of testimony does not show that the negotiations proposed to be proved were after the relocation, and the rather lame statement was made that parties refused to take said \$500 contract because the claim had been relocated. It is not quite conceivable why a contractor should object to doing the work because the relocation had been made. If he received his pay for his contract, it would not be material to him whether the plaintiff's title to the ground was good or bad. We do not think that the offer of this testimony showed any substantial effort to diligently complete the representation of the claim. Plaintiffs allowed work to cease altogether for 15 days, during which time they could have easily placed the question of forfeiture beyond dispute; and they do not make it clear whether their efforts to place the \$500 contract were before or after relocation.

The judgment of the district court and the order denying a new trial are affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

GILLIAM, RESPONDENT, v. BLACK, APPELLANT.

[Submitted April 14, 1896. Decided May 20, 1896.]

16	217
18	284
16	217
24	74
16	217
32	216

MECHANICS' LIEN—*Parties defendant—Agency—Pleading and proof.*—When plaintiff, in an action to foreclose a mechanics' lien, alleged a contract with the defendant for the work sued for, but proved a contract with another person not a party to the action and between whom and defendant no agency existed, a non-suit should have been granted.

SAME—*Parties defendant—Personal judgment.*—In an action to foreclose a mechanics' lien the party with whom the plaintiff contracted is a necessary party to the suit and the only party against whom the plaintiff is entitled to a personal judgment. (*Duignan v. Montana Club*, ante, page 189, cited.)

APPEAL—*Review of evidence—Errors of law.*—It is no objection to the review of evidence contained in a statement on appeal that the appeal was not taken within sixty days from the rendition of judgment as required by section 421 of the Code of Civil Procedure, where the evidence is examined for the purpose of determining errors of law presented by the record,—as the refusal of a nonsuit and the giving of instructions.

Appeal from Ninth Judicial District, Gallatin County.

ACTION to foreclose mechanics' lien. Judgment was rendered for the plaintiff below, by BENTON, J., sitting in place of ARMSTRONG, J. Reversed.

Luce & Luce, for Appellant.

Will G. Fleischauer, for Respondent.

PEMBERTON, C. J.—This is an action to foreclose a mechanic's lien. The complaint alleges a contract with the defendant, under which plaintiff claims to have performed labor and services for him in the erection and construction of a certain building in the town of Belgrade, in Gallatin county, at the agreed price of \$3.50 per day, payable on demand, after the completion of the work. The complaint alleges a demand, and failure to pay, and is otherwise, in substance, such as is commonly used in such cases. The answer denies every material allegation in the complaint. The case was tried to a jury, and a general verdict was rendered in favor of the plaintiff. The defendant appeals from the judgment.

The principal error assigned is the action of the court in

overruling defendant's motion for a nonsuit at the close of the plaintiff's testimony. The complaint alleges a contract with the defendant for the performance of the work sued for, and for which plaintiff claims his lien. The evidence of the plaintiff showed positively that he did not make the contract with the defendant, but with one Alexander Brothers, who is not made a party; nor is there the slightest evidence that Brothers is the agent of defendant. In fact, the evidence is positive that no such agency existed. Upon this showing, defendant moved for a nonsuit. We think the motion should have been sustained. Without question, it devolved upon the plaintiff to prove the contract for labor, as alleged in the complaint. If the contract was not made, as alleged, with defendant, but, as the evidence conclusively shows, with Brothers, then Brothers was a necessary party to the suit. Brothers, being the contractor, was the only party against whom plaintiff was entitled to a money or personal judgment. (Comp. St. p. 1032, § 1379.) The property of the defendant could only be sold to satisfy any lien plaintiff showed himself entitled to, in the event he could not satisfy his judgment against Brothers out of property belonging to him. The defendant, not being the contractor, was not primarily liable to plaintiff; nor, under such circumstances, was plaintiff entitled to a personal judgment against him. (Id. §§ 1383, 1384; *Duignan v. Montana Club*, ante, page 189.) The defendant also moved for judgment notwithstanding the verdict. The grounds of this motion were substantially the same as contained in the motion for nonsuit. This motion was overruled. This is assigned as error. But, after what has been said as to the ruling on the motion for nonsuit, it is unnecessary to treat this assignment.

The instructions to the jury ignored the necessity of making Brothers a party, and were, in effect, that plaintiff was entitled to a personal judgment against the defendant, notwithstanding the evidence showed he was not a party to the contract sued on. The giving of these instructions is assigned as

error. We think, from what has been said above, that they were manifestly erroneous.

The respondent contends that the only question presented by this appeal is as to whether the evidence supports the judgment, and that under section 421, Code Civ. Proc., the evidence cannot be reviewed, because the appeal was not taken within 60 days from the rendition of judgment. We cannot agree with this contention. There are errors of law assigned, such as we have treated above. In order to determine these questions of law, we are compelled to examine the evidence. The sustaining or refusing a motion for nonsuit is a matter of law. (*Kleinschmidt v. McAndrews*, 117 U. S. 282, 6 Sup. Ct. 761.) The giving or refusing of instructions is a matter of law. To determine whether they were properly or erroneously given or refused, necessarily involves an examination of the evidence. The evidence is embodied in the statement on appeal, and we think may be properly examined to determine the errors of law presented by the record.

The judgment is reversed, and the cause remanded.

Reversed.

DEWITT and HUNT, JJ., concur.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1895.

PRESENT :

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. DE WITT, } Associate Justices.
HON. WILLIAM H. HUNT, }

GARDNER, RECEIVER, RESPONDENT, v. CALDWELL,
SHERIFF, ET AL., APPELLANTS.

[Submitted, May 9, 1895. Decided, June 3, 1895.]

RECEIVER—*Functions of*—*In charge of property in litigation*.—A receiver in charge of property in litigation is to be regarded as the officer of the court which appointed him. He stands as an indifferent person, clothed with the power of receiving and preserving the property and assets involved in the suit wherein he was appointed, for the benefit of whoever may finally be declared to be entitled to them. (*Stebbins v. Savage*, 5 Mont. 263, cited.)

SAME—*Levy under execution on property in hands of*—*Infraction*.—Where, in an equitable action, a receiver has been appointed, *pendente lite*, by a court of competent jurisdiction, to take charge of the property and affairs, including rights of way, franchises and assets of a corporation, and has taken charge and is in possession of all such property, a judgment creditor of the corporation, who instituted his action and obtained his judgment in a court of co-ordinate jurisdiction in another district of the

state, subsequent to the appointment of such receiver, and subsequent to the taking of possession by such receiver, may be restrained by injunction from levying an execution upon the property of the corporation in the hands of the receiver, or upon any interest that such corporation may have in such property in the receiver's hands.

Appeal from Ninth Judicial District, Gallatin County.

ACTION to enjoin the enforcement of a judgment. The cause was tried before ARMSTRONG, J. The plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff brings this action to enjoin the sheriff of Gallatin county from levying upon and selling the property of the Gallatin Canal Company, said property being in the hands of respondent as receiver, and to enjoin defendant Marlow from trying to enforce the collection of a judgment against the property of said Gallatin Canal Company.

In March, 1892, one W. H. Tracy *et al.* commenced an action, which is still pending, in the district court of the Ninth judicial district, against the Gallatin Canal Company. In May, 1892, plaintiff, Gardner, was duly appointed by said court as receiver of all the properties and assets of said Gallatin Canal Company. He qualified as receiver, and at once took into his possession and under his control all of the properties, franchises, rights of way, and assets of said corporation, and is now in possession of all of said properties, and has issued receiver's certificates for the repairs of said canal property. In April, 1893, and while the receiver was in charge, defendant Marlow sued the Gallatin Canal Company, by action commenced in the district court of the First judicial district, and obtained judgment against the said Gallatin Canal Company for about \$28,000. In July, 1893, execution was issued in said judgment, commanding the sheriff of Gallatin county to levy upon and sell the properties of said Gallatin Canal Company, or so much thereof as might be necessary to satisfy said debt, which properties are those in the possession of plaintiff as receiver.

The complaint further pleads that the sheriff is about to levy

upon and sell said properties, and that the sheriff and said Marlow had actual knowledge that this plaintiff was the receiver of the Gallatin Canal Company, and in possession of the properties of said company. The defendants demurred generally to the complaint. Their demurrer was overruled. Judgment awarding an injunction was made and entered, as prayed for in plaintiff's complaint. Defendants appeal.

Massena Bullard, for Appellants.

Hartman & Hartman, for Respondents.

HUNT, J.—The issue tendered by the pleadings may be briefly stated as follows: Where, in an equitable action, a receiver has been appointed, *pendente lite*, by a court of competent jurisdiction, to take charge of the property and affairs, including rights of way, franchises, and assets of a corporation, and has taken charge and is in possession of all such property, can a judgment creditor of the corporation, who instituted his action and obtained his judgment in a court of coordinate jurisdiction in another district in the state, subsequent to the appointment of such receiver, and subsequent to the taking of possession by such receiver, levy an execution upon the property of the corporation in the hands of the receiver, or upon any interest that such corporation may have in such property in the receiver's hands?

Under established and familiar principles governing the functions of receivers in charge of property in litigation, the receiver is to be regarded as the officer of the district court of Gallatin county, which, in the exercise of its chancery powers, appointed him. He stands as an indifferent person, clothed with the power of receiving and preserving the property and assets involved in the suit wherein he was appointed, for the benefit of whoever may finally be declared to be entitled to them. The principle upon which the court proceeded is based upon that of securing the subject-matter of the litigation to whoever may ultimately own it and be lawfully entitled to the possession of it. To effectually carry out this object, the court

itself has, by its order appointing a receiver, declared that it was inequitable that either party should have possession or control of the Gallatin Canal, or any other property of the Gallatin Canal Company, and the rents, issues, and profits thereof, pending the litigation of the case referred to in the complaint.

Without changing the title, but in the exercise of what is regarded as a branch of the extraordinary powers of a court of equity, the court may be said to have taken possession of the property, and deprived the corporation of its possession, and, through the receiver, assumed the entire control and custody thereof, and retains the same until, by formal adjudication, there is a determination of the rights of the parties interested. But the appellants claim a right to levy upon and sell the property of the corporation, even though it be in the receiver's hands, arguing that, while they may not have a right to dispossess the receiver, yet they may sell the canal, and thus establish a lien thereon, which need not interfere with any future act of the receiver, who would only proceed having due regard for the judgment creditors' rights. Just how appellant proposes to proceed to execute his plan without interfering with the receiver we cannot tell; nor can we satisfactorily reconcile his position with the reason of the established rules of equitable jurisdiction, which forbid generally any interference with the possession of the receiver, not only upon grounds of convenience, but of danger of defeating the object of placing the fund or property *custodia legis*, by having the property wrested from the receiver's possession at the instance of any particular creditor, or so incumbered as to impair its value in his hands as a fund for final distribution in any judgment to be rendered in the original suit.

The earliest case to which the court have access and the leading authority laying down the doctrine that where a receiver has been put in possession of an estate, or, to be more accurate, where the court has once taken possession by putting a receiver upon the estate, is *Angel v. Smith*, 9 Ves. 335, decided in 1804. Ejectment was brought without leave of court.

Lord Eldon said: "It is clearly a contempt of this court to disturb sequestrators; and the party cannot claim, though by an adverse title, in any other way than by coming to be examined *pro interesse suo*. Consider the consequence. How are sequestrators to defend their possession against an ejectment? The court of king's bench have decided that where a sequestration is awarded to collect money to pay a demand in equity, if it is not executed, that is, if the sequestrators do not take possession, and a judgment creditor takes out execution, notwithstanding the sequestration awarded there may be a levy under the execution; intimating that, if the sequestration is executed, the other, though prior, must come here." The writ of sequestration referred to by the lord chancellor was issued to seize the personal estate and profits of the real estate of a defendant, and to detain them subject to the order of the court. It was intended to enforce the performance of the decree of the court where a defendant absconded. (Bl. Comm. bk. 3, p. 444.) It was argued before Lord Eldon, as appears by the report above referred to, that there was no difference between the position of a receiver and that of sequestrators, who were the officers of the court. Lord Eldon held that he had no doubt that, where sequestrators were in possession under the process of the court for the purpose of raising a duty, their possession could not be disturbed, even by an adverse title, without leave, "upon this principle: that the possession of the sequestrators is the possession of the court." "As to receivers, I am very sure, though I cannot refer to the case, that the same rule has obtained wherever a receiver has been put upon the estate. I am also very confident that I have heard that motion for leave to bring an ejectment against the receiver more than once, since I have sat here. The register also apprehends such motions have been made. There may be inconvenience in that, but the inconvenience the other way is enormous. If it is necessary to ask leave, the court must have credit for never refusing it where it ought to be granted; and, if so, very great purposes of convenience may be answered by putting the party to ask it."

We find this general principle sustained in the case of *Atlas Bank v. Nahant Bank* (Mass. 1839; Shaw, C. J.) 23 Pick. 480, where it was held in the case of an attachment by an individual creditor of the assets of a bank, made after the filing of the bill asking for an injunction on the bank, on the appointment of the receivers, that the transfer of the property to the receivers necessarily removed the property from all future liability to attachment at the suit of an individual creditor; that the proceedings had relation to the time of the filing of the bill.

In *Hubbard v. Hamilton Bank*, 7 Metc. (Mass.) 340, in distinguishing between the case of an attachment before and one made after proceedings were instituted, praying for an injunction and the appointment of receivers, the court say: "In the latter case the attachment is ineffectual. The property is in other hands, and beyond the process of an attachment."

In *Noe v. Gibson* (1839) 7 Paige, 513, Chancellor Walworth said: "It is well settled that after a receiver has been appointed, and has taken the rightful possession of the property, it is a contempt of court for a third person to attempt to deprive him of that possession by force, or even by a suit or other proceeding against him without the permission of the court by whom the receiver was appointed;" and declared that this principle was applicable to every other interference with the possession of a receiver, sequestrator, committee, or custodian who holds the property as the officer of the court, as his possession is in law the possession of the court itself.

The supreme court of the United States, in *Wiswall v. Sampson* (1852) 14 How. 52, decided that, when a receiver had been appointed, his possession was that of the court, and any attempt to disturb it without the leave of the court first obtained will be a contempt on the part of the person making it. As peculiarly applicable to the contention of the appellants in the case at bar, we quote the following language from the opinion of Justice Nelson: "It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receivers, and hence no con-

tempt of the authority of the court, and that the sale, therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And, in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation become fruitless. It is true, in administering the fund the court will take care that the rights of prior liens or incumbrances shall not be destroyed, and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?"

In *Field v. Jones* (1852) 11 Ga. 413, in equity, the receiver was held not subject to garnishment, and not at liberty to bring or defend actions without especial leave of court; that he was but the agent of the court, and could not involve it in litigation; and that, if a receiver were subject to garnishment, such liability would defeat the ends for which receivers were appointed; and that his duty as receiver would be defeated by judgments at law on garnishment, and the beneficial jurisdiction of chancery in this regard would be defeated.

A more recent decision in Georgia takes the same view of the law. (*Marshall v. Lockett*, 76 Ga. 289. See also, *Waples on Attachment*, pp. 220, 221.)

In Iowa, the supreme court held in the case of *Martin v. Davis* (1866) 21 Iowa 535, that property levied upon while in the hands of a receiver appointed by the court was "in the

custody of the law, and not properly or legally liable to seizure by an officer under an execution."

Robinson v. A. & G. W. Railway Co., 66 Pa. St. 160, generally recognized as an authority, was where the plaintiff levied upon property of the defendant company, which, however, was mortgaged. A receiver had been appointed before the levy of the execution, but after judgment was recovered. The property levied on was included in the mortgage. The court held that it passed into the custody of the receiver; and to permit it, while in legal custody, to be levied on and sold under the process of another court, would at once raise a conflict of jurisdiction, and interfere with the right of the receiver of the court to manage the property under his appointment. "If the property," say the court, "might be taken piecemeal from the custody of the receiver, the remedy of the creditors under the mortgage would become worthless, or at least greatly imperilled. Ample authority has been cited by the defendants in error. If a creditor believes that the property was not legally mortgaged, or for any good reason should not pass into the hands of the receiver, his duty is to apply to the court having appointed the receiver to ask its discharge out of custody in order that he may proceed against it. For these reasons, we think, the court below was right in setting aside the levy and execution."

We find the argument of confusion and inconvenience of weight with certain courts, notably North Carolina, where it was held in *Skinner v. Maxwell*, 68 N. C. 400, that, "when a court of equity has undertaken to adjudicate upon and distribute a fund among the parties entitled to it, it would be inconvenient if a court of law (or any other court) could by its process interrupt the adjudication and create new rights in the property itself. This rule is not understood as absolutely preventing the acquisition of new rights to the fund in controversy after the commencement of the proceedings. Any person claiming to have acquired such an interest *pendente lite*, while he cannot interfere under the process of another court, may apply to the court which has jurisdiction of the fund, *pro*

interesse suo, and his claim will be heard. (2 Story, Eq. Jur. §§ 831-833a.) The limits of this principle are somewhat uncertain, but it is sufficient for the present case to say that, while property is in the hands of a receiver, no right to it can be acquired by sale under execution. And it makes no difference that the receiver appointed declined to act; the property was, nevertheless, in the custody of the law."

In a proceeding adjudging respondent guilty of contempt in not paying to the relator certain moneys which he held as receiver under the appointment of the court below, and which the court had ordered him to pay to the relator, but which he continued to hold as garnishee in proceedings taken in a justice's court, Chief Justice Campbell, in *People v. Brooks* (1879) 40 Mich. 333, held that the custody of a receiver is the custody of the court, and that it would lead to great confusion if a receiver were subject to take the funds in his official custody into any other tribunal, which could have no power to discharge him, to settle his accounts, or to punish him for collusion, and that the only practice which would save clashing among courts, and give to every court in equity such control over its own officers as is necessary, until they are finally discharged, was to not permit liens to be interfered with by garnishment or otherwise, without leave.

It was held in the case of *Dugger v. Collins*, 69 Ala. 324, that, when a sheriff has levied upon property in the hands of a receiver, equity will not interpose by an injunction in behalf of the sheriff enjoining a suit at law against him for interference, and that to permit property while in the custody of a receiver to be levied upon and sold under the process of another court would at once give rise to a conflict of jurisdiction, and would seriously interfere with and impair the receiver's right to the management of the property under his appointment.

It was urged in the Alabama case that the possession of the property in the hands of the receiver need not be disturbed, just as is urged in the case under consideration by the appellants. But the court declined to follow the argument advanced, and, as against the right to levy and sell lands in the hands of

a receiver, cited *Wiswall v. Sampson* and *Robinson v. Railway Co.*, *supra*. It is to be observed, too, that the court took this view of the law in a case much stronger than the one at bar, for the plaintiff there obtained his judgment before the receiver was appointed, and before the property was placed in his hands. Nevertheless, it was decided he did not acquire a lien by placing execution in the hands of the sheriff until long afterwards.

In *Edwards v. Norton* (1881) 55 Tex. 405, real estate in the hands of a receiver, to hold possession and collect the rents, was decided to be protected from levy of execution. In that case, too, it was urged that a levy on real estate left the possession undisturbed, and that the purchaser took the title of the defendant in execution subject to the possession of the receiver and the result of the suit. The court stated that argument was met by the case of *Wiswall v. Sampson*, *supra*, and added that they could "see no sufficient reason why the rule should be relaxed so as to facilitate execution sales of real estate in litigation."

We are not wholly without authority bearing upon the question, in our own supreme court. In *Stebbins v. Savage* (1884) 5 Mont. 253, an appeal from an order appointing a receiver, Wade, C. J., said: "The appointment of a receiver carries with it a right to the possession of the property described, and the further right not to be interfered with in such possession so long as the appointment remains in force. These are the ordinary powers and rights that belong to a receiver in order to make his appointment effectual, and they would have belonged to him, and he could have possessed and held the property, if they had not been mentioned in the order. * * * He is an officer of the law, and in his hands the property is in the custody of the law. He preserves and protects the property for the benefit of the rightful owner."

The question was discussed in *Jackson v. Lahee* (1885) 114 Ill. 287. The court said: "The law will not permit that possession to be disturbed without the consent of the court that first obtained jurisdiction to appoint the receiver. It

would seem an anomaly that a lien adverse to the rights of the receiver could be obtained, so as to control the distribution to be made. Obtaining a lien implies it may ultimately take the property or funds to which it attaches, and, if that could be done in this case, it would withdraw the same from the custody of the law, or from (what is the same thing) the custody of the receiver having the same in possession."

In *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, the court of appeals held that a sale of property under levy of execution, where the property was in charge of a receiver, was void, unless authorized by the court which appointed the receiver. The doctrine is again recognized by the court of appeals of New York in *Re Christian Jensen Co.*, 128 N. Y. 550.

In a very recent case, *In the matter of the application of the Schuyler Steam Towboat Company for dissolution* (136 N. Y. 169), a receiver had been appointed by the supreme court of New York on July 31, 1891. The order appointing the receiver was filed August 1, 1891. August 3d the bond was approved, and August 4th filed. In the afternoon of August 1st the boats belonging to the corporation were libeled, and the United States marshal took possession. The receiver brought suit to restrain the libelants from further steps in the United States court. The court decided that the right of possession was in the receiver from the time of filing and entering the order appointing him; that the property of the corporation vested in him; that the property was in the custody of the law, and no other court could obtain jurisdiction over the property after such appointment, even under process upon which possession was taken prior to the qualifying of the receiver; that the court had the power to preserve and to protect it, it being in the custody of the law; and that, furthermore, "as was said in *Heidritter v. Oilcloth Co.*, 112 U. S. 305, 'when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it.' That dominion was ac-

quired by the order appointing the receiver in this proceeding." (Freeman on Executions, § 129.)

No sale of property in the hands of a receiver will be allowed on execution, under another judgment, without leave of court first obtained for that purpose. (High on Receivers, § 422; Beach on Receivers, § 224; Daniell, Ch. Pl. & Prac. § 743; 2 Story, Eq. Jur. 833a.) Persons claiming an interest in the realty may, doubtless, come into court and be heard in relation to their interests, but they cannot interfere with the possession of the receiver, unless by order of court. (High on Receivers, § 146.)

The appellants rely on several cases not in point. In *Albany City Bank v. Schermerhorn*, 9 Paige 372, the creditor who made levy upon the realty had secured judgment apparently before the petition was filed asking for a receiver. The case, too, arose on a question of contempt. Under the facts, which are very dissimilar to those in the case at bar, the court held that there was no contempt committed in levying. The principle sustained in the case goes no further than stated by High (§ 171), that "where a receiver is in the actual possession of the defendant's real estate, which is subject to a lien of a judgment against the defendant, the levy upon and sale of the defendant's interest in the real estate by a sheriff does not disturb the receiver's possession, and is not a contempt of court." The text of Mr. High's book must be taken as cautiously restricted in its application to cases where the judgment was obtained and lien attached before the receiver was appointed. The exact purport of the opinion is expressly recognized in the Alabama decision cited above. (See, also, *Wheeler v. Walton & Whann Co.*, 65 Fed. 720.)

Wheaton v. Spooner, 52 Minn. 417, 54 N. W. 372, also relied upon by appellants, turned upon the right to levy an execution upon a judgment which had been obtained prior to the appointment of a receiver. It was held that a judgment creditor of the party who was the judgment creditor of the syndicate, whose property was in the receiver's possession, could levy by execution upon the judgment, as the judgment be-

longed, not to the syndicate, but to the judgment creditor, and was subject to his control.

Being impressed with the reasoning of the cases reviewed, and with the justice of the rule as it has been expanded since first enunciated by the English courts, we think it a sound policy to hold that while the defendants' property is *in custodia legis*, as in the custody of a receiver, there can be ordinarily no interference with the receiver's possession by actual seizure or by sale of the debtor's interest in the corporation's property subject to the possession of the receiver, where the execution has been issued since the receiver was appointed. And we are further satisfied that no such levy can properly be made under an execution issued from the district court of Lewis and Clarke county against property in the hands of the receiver who was appointed by and was subject to the orders of the district court of Gallatin county.

The appellants had a right, it would seem, to establish by judgment their debt against the corporation by suit in Lewis and Clarke county. but they had no right to proceed to levy an execution upon the property of the corporation in the custody of the receiver in another judicial district.

In an exhaustive and learned opinion of the supreme court of Alabama, rendered in 1891 (*Gay v. Briarfield Coal & Iron Co.*, 94 Ala. 303, 33 Am. St. Rep. 122), after carefully reviewing many federal decisions, the principle that no court can interfere with the custody of property held by another court through a receiver, but that all claims on the property in the custody of the receiver must be under the control of the court having such custody, is discussed; and the conclusion reached that, to preserve harmony between courts of concurrent jurisdiction, it is very important that the writs or processes of one court shall not interfere with or disturb the possession of any subject-matter then *in gremio legis*. See, also, *Dillingham v. Anthony*, 73 Tex. Sup. 47, 3 L. R. A. 631.

We do not attach importance to the lack of actual knowledge on the part of the judgment creditor (Marlow) in the suit at law of the fact that a receiver had been appointed by the court

in the Tenth judicial district. That point might have some bearing in a contempt proceeding, where different considerations control, but not in this action for injunction against an unwarranted levy. The denial of the right to levy the execution is upon the broader grounds hereinbefore discussed. As was said by the vice chancellor in *Evelyn v. Lewis*, 3 Hare 472: "Whether the party proceeding at law did or did not know that a receiver had been appointed over the property, or however clear the right of the claimant might be, the court would restrain the prosecution of the claim if it were instituted without leave of this court."

Restricting our decision, therefore, to a negative answer to the principal question stated, we think that the district court which appointed the receiver properly restrained the sheriff from proceeding, and the judgment creditor from trying to enforce collection by interfering in any way with the receiver or the property in his custody. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

MCCOWAN, APPELLANT, v. MACLAY, RESPONDENT.

[Submitted May 13, 1895. Decided June 3, 1895.]

MINES AND MINING—Location notice—Power of legislature.—It is within the power of the state legislature to enact that the notice of location of a mining claim shall be on oath, as required by section 1477, fifth division of the compiled statutes. (Doubted in *Wenner v. McNulty*, 7 Mont. 30; but fully affirmed in *O'Donnell v. Glenn*, 3 Mont. 248, which ruling is followed as the law of the case in *O'Donnell v. Glenn*, 9 Mont. 452, and was followed as *stare decisis* in *Prescott v. Metcalf*, 10 Mont. 284.)

SAME—Same—Insufficient verification.—Under section 1477, fifth division of the compiled statutes, requiring any person who discovers a mining claim to make and file a declaratory statement, on oath, of such discovery or location, describing the claim in the manner provided by the laws of the United States, the declaratory statement must be of the discovery or location, as well as of the description of the claim, and where an affidavit states merely that "the description of said lode," as given in the notice, "is true and correct," this is a verification as to one item only, and the location notice is fatally defective. (*Metcalf v. Prescott*, 10 Mont. 284, cited.)

SAME—Same—Same.—The statement in a verification of a location notice, that the locators "have in every respect fully complied with the requirements of Chapter 6, of

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Title 22 of the Revised Statutes of the United States, and the local customs and laws regulating mining locations," is simply a conclusion of law, and not a verification of any fact.

SAME—Adverse claim defined—Possession for period of statute of limitations.—The words "in the absence of any adverse claim" as used in section 2332 of the Revised Statutes of the United States, providing that evidence of the possession and working of a mining claim for a period equal to the time prescribed by the statute of limitations for mining claims of the state where the same is situated shall be sufficient to establish a right to a patent thereto, in the absence of any adverse claim, mean an adverse claim filed in the land office within sixty days, as required by section 2325, Id., in opposition to an application for a patent to mining premises made by another person in such office, and do not mean an adverse claim filed within the statute of limitations. It being the purpose of the statute to prevent an applicant for patent from falling to obtain his patent simply for defects in his claim where he had been in undisputed possession for the period of the statute of limitations, and no one appeared in the land office to adverse his application.

Appeal from Sixth Judicial District, Meagher County.

ADVERSE suit. Judgment was rendered for the defendant below by HENRY, J., sustaining a demurrer to the complaint. Affirmed.

McConnell, Clayberg & Gunn, for Appellant.

Toole & Wallace, for Respondent.

DEWITT, J.—The defendant applied for a United States patent for certain mining premises. The plaintiff filed his adverse claim in the United States land office, and commenced this action, which is commonly known as an "adverse suit." (*Davidson v. Bordeaux*, 15 Mont. 245, and cases cited; *Anthony v. Jilson*, 83 Cal. 296.) A demurrer to plaintiff's complaint was sustained, and judgment rendered and entered for defendant. Plaintiff appeals.

The plaintiff depended upon the location of the Yellow Jacket claim. He set out the location notice of this claim, and the affidavit verifying the same, in his complaint.

One point raised by the demurrer was that the verification of the location notice was insufficient. Our statute requires that the notice of location of a mining claim shall be on oath. (Compiled Statutes, fifth division, § 1477.) That this requirement of our statute is within the power of the state legislature was doubted in *Wenner v. McNulty*, 7 Mont. 30, but was

finally affirmed in *O'Donnell v. Glenn*, 8 Mont. 248, which ruling was afterwards followed as the law of the case on the second appeal of *O'Donnell v. Glenn*, 9 Mont. 452, and was followed as *stare decisis* in *Metcalf v. Prescott*, 10 Mont. 283. The Ninth circuit court of appeals of the United States recently encountered this question in *Preston v. Hunter* (not yet officially reported), 67 Fed. 996, but passed it without an expression of opinion. We shall not now disturb the law of this jurisdiction in this respect.

The question then presents itself, was the verification of the Yellow Jacket notice of location insufficient? It is as follows:

“Territory of Montana, County of Meagher—ss.: John C. O'Brien, James L. Neihart, and Samuel R. Harley, being duly and severally sworn, depose and say that they are of lawful age, and citizens of the United States; that they have heard read the above notice of location of fifteen hundred linear feet on the Yellow Jacket lode; that the description of said lode as therein given is true and correct; that they have in every respect fully complied with the requirements of chapter 6, title 32, of the Revised Statutes of the United States, and the local customs and laws regulating mining locations, and that they are three of the within-named locators.” (Subscribed and sworn to.)

Does this affidavit verify the notice? Is the notice a declaratory statement upon oath? (Compiled Statutes, fifth division, § 1477; *Metcalf v. Prescott. supra.*) The notice is a declaratory statement, but the question is, do the locators, or any of them, make the statement under oath? We are of opinion that they do not. They make only one portion of it under oath, and that is that the description of the lode, as given in the notice, is true and correct. There is no oath that any portion of the location notice is true, except this one item, and therefore the location notice is not verified, except as to this one item, unless it can be held that the words, “description of the lode,” include the whole notice. But we are of opinion that such construction of these words cannot obtain. The meaning of the words, “description of the lode,” we think, is

entirely clear. Webster's International Dictionary defines the word "description" as follows: "A sketch or account of anything in words; a portraiture or representation in language." The same authority gives among the synonyms of this word: "Account;" "definition;" "recital;" "narration;" "explanation;" "representation." The Century Dictionary, among other definitions of the word, has the following: "Representation by visible lines, marks, colors, etc. The act of representing a thing by words or signs, or the account or writing containing such representation. A statement designed to make known the appearance, nature, attributes, accidents or incidents of anything, as a description of a house or battle." Furthermore, the word "description" in conveyances of real estate and in legal instruments in writing generally has an established meaning. It is the language which depicts the thing under consideration. See Anderson's Law Dictionary, under the word 'Description.' See, also, Black's Law Dictionary, under the same head, where the word "description" is defined as: "(1) A delineation or account of a particular subject by a recital of its characteristic accidents and qualities. (2) A written enumeration of items composing an estate, or of its condition, or of titles or documents; like an inventory, but with more particularity, and without involving the idea of an appraisement. (3) An exact written account of an article, mechanical device, or process which is the subject of an application for a patent. (4) A method of pointing out a particular person by referring to his relationship to some other person or his character, as an officer, trustee, executor, etc. (5) That part of a conveyance, advertisement of sale, etc., which identifies the land intended to be affected."

We are therefore of opinion that the word "description," as used in the affidavit under consideration, meant the delineation or account of the Yellow Jacket mining claim by the recital of its metes and bounds, or courses and distances, and its geographical position. See definition from Black, Law Dict., *supra*.

Counsel for appellant contend for a broader definition or use

of the word "description" as it appears in the affidavit and in the statute (section 1477). They argue that the words, "description of the lode," refer to the whole location notice, and that when it is affirmed on oath that the "description" is correct it is thereby affirmed that the whole notice is true; that is to say, that the whole location notice is the description of the lode. We cannot consent to this construction. It does violence to all ideas of the meaning of the word "description." We are of opinion that the word is not used in section 1477 in the sense that counsel claims, but that it is employed by the lawmakers in its ordinary and well-known signification. Section 1477 provides that any person or persons "who shall hereafter discover any mining claim * * * shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery or location is made, a declaratory statement thereof, in writing, on oath, * * * describing said claim, in the manner provided by the laws of the United States." The locator, under this statute, was to file in the county in which said location is made a declaratory statement thereof. The word "thereof," as here used, means the declaratory statement of said discovery or location. The declaratory statement on oath must be of the discovery or location, and not simply of the description of the claim. This language seems to be clear, and the intent seems to be plain. A few lines further in the statute it is also provided that the declaratory statement shall also describe such claim in the manner provided by the laws of the United States. Therefore it appears that the declaratory statement shall be of the discovery or location, as well as the description of the claim, and it would be unreasonable to hold that a person taking oath that the description of a claim was correct was hereby taking oath that all other matters set up in the notice of location or declaratory statement were also true. It therefore follows that the location notice of the Yellow Jacket lode, being verified as to only one of its items, was not a declaratory statement on an oath of the discovery or location of a claim.

It is observed that the affidavit further states that the locators have fully complied with the requirements of law and local customs. This, however, is simply a conclusion of law, stated by the locators, and not a verification of any fact. (*Anthony v. Jilison*, 83 Cal. 296.) We must therefore conclude that plaintiff's location notice was fatally defective.

Plaintiff contends further, however, that even if he had no notice of location at all, he pleads in his complaint that he and his predecessors in interest have been in possession of the premises, and worked them as a mine, for a period equal to the statute of limitations of this state, and that, therefore, he is entitled to prevail in this action. He relies upon section 2332 of the Revised Statutes of the United States, which is as follows: "Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

It is said in *Glacier Mining Co. v. Willis*, 127 U. S. 471: "With reference to the third ground of the demurrer, it is only necessary to say that the complaint alleges that a valid and legal location of said tunnel was made by persons under whom the plaintiff claims, and that the plaintiff held possession of the same for more than five consecutive years prior to the ouster by the defendants, and paid all the taxes during that period legally or otherwise assessed upon said property. This, under the laws of Colorado would give the plaintiff a right to the premises in dispute superior to any other claim except that of the government." But these remarks are not applicable in this case. There plaintiff depended upon a "valid and legal location." Here plaintiff had not a valid location, as we have determined.

We are of opinion that the words "adverse claim" in section 2332 are used in the same sense as they are employed throughout the whole of chapter 6, title 32, which is the min-

ing law of congress. The signification of these words in the sections of the mining law is a claim filed in the United States land office, opposing an application for patent to mining premises, made by another person. The claimant applies for patent. The adverse claimant opposes him. Each claims the ground which is in controversy.

To support our view as to the meaning of the words "adverse claimant" and "adverse claim" we note the following language of section 2325. That section states: "If no 'adverse claim' shall have been filed * * * at the expiration of sixty days, it shall be assumed that the applicant is entitled to a patent, *

* * and thereafter no objection from third parties *

* * shall be heard." Again, in section 2326, we find the following: "Where an 'adverse claim' is filed * * * it shall be upon oath," etc. Again, in the same section: "It shall be the duty of the 'adverse claimant,' within thirty days," etc. Again, it is stated in the same section "that a failure on his part shall be a waiver of his 'adverse claim.'"

We must therefore conclude that the "adverse claim" mentioned in section 2332 means the land office adverse claim. Section 2332, in its order in the act, follows the provisions of law as to applying for patent and proceedings under said application, and the filing of adverse claim. The section says: "Where such person or association * * * have held and worked their claims for a period equal to the time prescribed by the statute of limitations," etc. We are of opinion that the words, "such person or association," etc., refer to the persons and associations which have been the subject of treatment in the preceding sections, namely, persons and associations who have complied with the terms of the law, and are applying for a patent for their mining premises. Preceding section 2332, all the details for an application for a patent and adverse the same have been provided for. Then comes section 2332, and provides that if such person or association,—that is to say, such applicants for patent—have held and worked their claims for a period of the statute of limitations, such facts shall establish their right to a patent, in the absence of an

“adverse claim.” We are of opinion that this section was enacted to meet cases where applicants for a patent have been in possession of their claims for a period of the statute of limitations, but were unable to make full proof of their rights to a patent, as required by the previous provisions of the law; and to excuse their defects in title congress determined that the land office should pass over such defects, and give them their patents, provided no one appeared to contest their applications. It would appear that the section was enacted to prevent an applicant from failing to obtain his patent simply for defects in his claim, when he had held a long undisputed possession, and no one had opposed him. The land office, under such circumstances, was thus authorized to omit some of the strict proof required from an applicant in consideration of there being no opposition to the application. But if an “adverse claimant” did appear, the contest should be referred to a court of competent jurisdiction for determination as in other cases. We are of opinion that the words, “in the absence of any adverse claim,” mean that patent shall be issued to such a claimant as is described in section 2332, if no one filed what is known in the land office as an “adverse claim,” within the period within which an adverse claimant may file such claim under the mining laws of congress. This view is consistent with the whole scope of the mining law and the practice in the land office thereunder. That such is the construction of the land office is apparent from the rules of that office as to section 2332. After citing that statute, rules 70 and 71 are as follows: “This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.” Rule 70. “When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to fur-

nish a duly certified copy of the statute of limitation of mining claims for the state or territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim." Rule 71.

We do not think it can be properly contended that the statute means "in the absence of an adverse claim filed within the period of the statute of limitations." If that construction were to obtain, it would be necessary to add words to the statute, and make it read, "in the absence of any adverse claim" *filed within the period of the statute of limitations*. The better view, in our opinion, is that the statute means that patent shall issue to an applicant for patent who brings himself within the requirements of section 2332, if no one appears in the land office to adverse his application. It is clear that plaintiff in this action is not within the purview of section 2332.

There are other points raised on the argument, but our views upon the matters discussed dispose of the appeal. The demurrer was properly sustained. It is ordered that judgment be affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

NEWELL ET AL., APPELLANTS, v. WHITWELL ET AL.,
RESPONDENTS.

[Submitted May 15, 1895. Decided June 3, 1895.]

16	243
16	255
17	556
16	243
18	473
16	243
20	354
21	180

ATTACHMENT—Motion to dissolve—Grounds for dissolution.—Plaintiffs attached the defendants on an account for goods sold on thirty and sixty days' credit and on an account for goods sold under a conditional credit agreement, printed and written on the bills, that the same should become due if any suit was brought against the purchaser. On motion to dissolve the attachment the defendants filed an affidavit to the effect that plaintiffs had agreed to extend a credit of five thousand dollars, and that, in consideration of the payment of eight per cent. interest on all bills not paid at the end of thirty and sixty days, only sums in excess of five thousand dollars should become due so long as defendants continued to trade with the plaintiffs; that the credit agreement on the bills was not called to the attention of defendants, nor made a part of their dealings at the time the goods were purchased, and that none of the debts were due or payable. A letter from the plaintiffs to the defendants, stating that they would accommodate them with a credit of five thousand dollars, charging eight per cent. interest on overdue accounts and asking for a property statement if the offer was satisfactory, and also invoices in which the credit condition did not appear, were attached to the affidavit as exhibits. Affidavits were filed by the plaintiffs denying defendants' version of the five thousand dollar credit arrangement and setting forth that as a condition of extending the proposed credit, defendants were required to furnish a property statement which was not done; that while selling goods to the defendants they delivered thirty-seven invoices, upon nearly all of which was distinctly printed the conditional credit agreement; that at no time were the defendants indebted to the plaintiffs to the extent of five thousand dollars; that all the invoices of the goods sued for contained the conditional credit agreement, and that the sum total of the amount due upon goods sold under the conditional credit agreement exceeded the sum total of the amount sued for. Letters were made part of plaintiffs' affidavit, in which defendants made remittances long before their credit approximated five thousand dollars, promised to clear their accounts up, and asked plaintiffs not to crowd them. The court required plaintiffs to elect whether they would amend their affidavit so as to exclude the amount of invoices upon which the credit agreement did not appear or submit to a dissolution of the attachment. *Held*, that an order dissolving the attachment upon plaintiffs declining to amend was error.

SAME—Same—Review on appeal.—Upon the hearing of a motion to dissolve an attachment, where the court heard no testimony other than the affidavits of the parties, the case on appeal must be decided by the appellate court precisely upon what was before the court below, that is, upon record evidence and nothing else.

SAME—Appeal—Conflict of evidence.—Upon disputed questions of fact, where there is a substantial conflict between the statements made by those who seek to dissolve an attachment and those who try to retain the lien thereof, this court will not disturb the decision of the court below, unless it is clearly against the preponderance of evidence. (*Landman v. Thompson*, 9 Mont. 18, cited.)

SAME—Amendment of proceedings.—The procuring of an attachment is a proceeding within section 116 of the Code of Civil Procedure, and, if such proceeding is defective, it may be amended in the furtherance of justice. (*Pierce v. Miles*, 5 Mont. 550; *Magee v. Fogarty*, 6 Mont. 237; *Joseph v. Mady Clothing Co.*, 13 Mont. 195, cited.) And the new Code of Civil Procedure of 1895, section 563, expressly provides for amendments to the affidavit in attachment.

SAME—Amendment in case of mistake as to amount of indebtedness.—Where one, in good faith has made a mistake in the amount of the indebtedness, to secure which an attachment was issued, it is within the power of the court to permit an amendment to

be made, and judgment to be entered in the proper sum, so that the plaintiff should not lose his whole lien because of an inadvertent error.

SAME—Sufficiency of affidavit.—Where part of the debt sued for is on an express and part on an implied contract an affidavit simply stating the affiants' conclusion, namely, that the defendants are indebted to the plaintiffs in a specified sum, upon an express and implied contract for the payment of money, which is now due and payable, is a sufficient compliance with the requirement of section 181 of the Code of Civil Procedure, that the affidavit in attachment must show that the debt sued is upon contract.

SAME—Duty of clerk in issuing writ.—Under our statute (sections 181, 182, of the Code of Civil Procedure, Compiled Statutes) requiring the clerk to issue the writ of attachment when the affidavit required by law has been filed and the necessary undertaking has been given, it was not contemplated that the clerk should exercise more than a ministerial duty in issuing the writ.

SAME—Trial of merits on motion to dissolve.—Under sections 200-202, of the Code of Civil Procedure, providing that a motion to discharge an attachment on the ground that the writ was improperly issued, may be made upon affidavits, and the plaintiff may oppose these affidavits by counter affidavits, or other evidence, in addition to those on which the order of attachment was made, an attachment may be dissolved for irregularities or imperfections in its issuance, not only apparent upon the face of the papers, but upon other grounds, wherein it is made to appear that the issuance of the writ was improper, but it is not within the scope of the inquiry under a motion to dissolve, to try the merits of the main action.

Appeal from Tenth Judicial District, Flathead County.

ACTION to recover for goods sold. Defendants' motion to dissolve the attachment was granted by DuBOISE, J. Reversed.

Statement of the case by the justice delivering the opinion.

Suit in attachment. On July 28, 1893, the appellants, merchants in Minneapolis, Minn., instituted suit against respondents, merchants at Kalispell, Mont., to recover \$4,016.40, due for goods sold and delivered, and for the sum of \$950.55, to become due on September 11, 1893. Affidavit in attachment was made by plaintiffs' agent, in which it was alleged that defendants were about to dispose of their property for the purpose of defrauding their creditors. August 5, 1893, defendants moved to discharge the writ of attachment, on the grounds, substantially, that the affidavit failed to show that the sum charged for the goods was a reasonable, agreed, or any value thereof; that when the suit was commenced the debt upon which it was instituted was not due; that the goods purchased by defendants, and for which the suit was brought,

were purchased upon time, as agreed upon by the parties, which time had not expired when the suit was instituted; and that the affidavit of plaintiffs was false and untrue. Other grounds were included in the motion, which it is not necessary to recite.

To support that motion certain affidavits were filed by the defendants, denying any disposition of their property, other than in the usual course of business, and denying any fraud on their part, or any intended fraud.

Upon August 19th plaintiffs filed an amended complaint, by leave of court, setting forth that between September 21, 1892, and June 5, 1893, defendants became indebted to plaintiffs for goods sold at the defendants' instance and request, between said dates, in the sum of \$4,016.40; that all of said goods were sold and delivered by plaintiffs to defendants on a credit of 30 and 60 days, and that all goods sold after April 10, 1893, were sold on 30 days' credit. Plaintiffs further allege that between May 29 and June 11, 1893, defendants became indebted to them in the sum of \$950.55 upon open account for goods sold between said dates; that on terms of conditional credit the said sum of \$950.55 became due on September 11th, if the conditions under which the goods were sold did not transpire. The credit contract was as follows: "A conditional credit, as stipulated on the face of this invoice, will be allowed on this bill, provided that, should any suit or action at law be brought against, or any lien be given by, the purchaser named in said invoice, or if he shall assign, sell out, change, or retire from business, this bill shall at once become due and payable." Plaintiffs allege that after the sale of the goods certain actions at law were commenced by various parties against defendants; that all these actions were brought before plaintiffs sued, by reason of which fact the said sum of \$950.55 became immediately due and payable. An amended affidavit in attachment was filed, in which E. S. Johnson, as duly authorized agent of plaintiffs, swore to the total indebtedness of defendants to plaintiffs in the sum of \$4,966.95, upon an express and implied contract for the payment of money.

Upon August 19th, the defendants, in support of their motion to dissolve, filed their affidavits, substantially as follows: Defendants and plaintiffs agreed that plaintiffs would extend the defendants a line of credit to the amount of \$5,000, and that no amounts owing to plaintiffs, excepting sums exceeding \$5,000, should be due and payable; and as long as defendants continued to purchase goods from plaintiffs the \$5,000 was not to be due and collectable, and, when they ceased to do business with plaintiffs, then the whole indebtedness was to be due and payable; and defendants, in consideration of that agreement, were to pay on all bills which were not paid at the end of 30 and 60 days from the date of the purchase, according to the class of goods purchased, 8 per cent. per annum thereon.

As an exhibit to their affidavit, defendants filed and attached a letter of plaintiffs to defendants, dated Feb. 4, 1893. The tenor of this letter to defendants is that plaintiffs, being informed by their agent that defendants desired to trade with them, and would require a credit of about \$5,000, plaintiffs would be glad to accommodate them, and receive their business, charging defendants interest on their overdue accounts at the rate of 8 per cent. per annum. The letter continued: "If this is satisfactory to you, we shall be pleased to have a property statement from you for reference. * * * We inclose herewith a blank for this purpose, which we trust you will feel disposed to fill out and return to us." The affidavit of the defendants further stated that at the time of purchasing the goods no conditions on the back of the invoices or bills, or any other conditions thereon, were made part of the dealings between the parties, and that no contract, other than the one hereinbefore stated, was made between the parties; and that when this suit was instituted, and the attachment issued, none of the debts upon which it was brought were due and payable; that the affidavits of plaintiffs stating the bills and invoices of goods sold and delivered to defendants by plaintiffs, and the conditions that the debt was to become due and payable upon the institution of any other suit, or issuance of attachment, are not true, but false. Affiants attached certain bills and invoices

delivered to defendants by plaintiffs, in which the credit condition did not appear; and affiants state that their attention was never called to any condition on the bills for the purchase of goods, or any other paper by which the debts sued for were to become due at any other time than as heretofore stated, and that the credit condition was not part of the negotiations between plaintiffs and defendants.

The invoices attached to defendants' affidavits were for various articles of merchandise, and are summarized as follows: May 29, 1893, terms 60 days, \$376.44; July 11, 1893, terms 60 days, \$262.61; April 22, 1893, terms 30 days, \$335.79; April 29, 1893, terms 30 days, \$407.91; April 29, 1893, terms 30 days, \$172.20; May 29, 1893, terms 30 days, \$22.95.

George R. Newell and Thomas P. Jumper, in behalf of plaintiffs, filed affidavits, denying specifically that such an arrangement in relation to the \$5,000 credit, as sworn to by defendants, was ever contemplated or entered into, and denied that in the letter hereinbefore set forth such an arrangement ever was referred to or contemplated; and set forth that as a condition of extending to defendants the credit proposed and contemplated by said letter, defendants were required and expected to furnish the plaintiffs a property statement, but that defendants never furnished the plaintiffs any statement whatsoever; that there were continual dealings between the parties from September, 1892, to July 11, 1893; that some of the goods sold were for cash, without credit, but mostly on credit of 30 and 60 days, and that never were the defendants indebted to plaintiffs in the sum of \$5,000, and that they continued to pay to plaintiffs money on their account, and made several payments of \$500 each in May and June, 1893, and that at the time of the commencement of the suit there was owing and due at least \$4,016.40 for goods sold and delivered prior to May 31, 1893; that the parties corresponded with one another, and that such correspondence in its purport is inconsistent with the agreement claimed by the defendants. The affiants re-aver the conditional credit agreement, and set forth that while the

plaintiffs were selling goods to the defendants they sent and delivered 37 invoices, under various dates, in all, or nearly all, of which the conditional credit agreement was written and printed.

Attached to the plaintiffs' affidavit are letters by plaintiffs to defendants asking for moneys on account, and urging prompt remittances on account of hard times. One letter, dated May 5, 1893, states the amount of defendants' indebtedness to be \$1,265, plaintiffs asking for \$800 or \$1,000. Another letter, of June 5, 1893, states their indebtedness to be \$3,174.90; it asks for \$1,000. Another letter, dated July 6, 1893, informs defendants that plaintiffs have drawn for \$500. The letters of defendants to plaintiffs, also made part of plaintiffs' affidavit, ask for statements of account, and promise to send more money. One letter in particular, dated June 16, 1893, tells plaintiffs that they remitted plaintiffs \$500 the day before, and will remit again in a few days, and asks plaintiffs not "to crowd defendants in the matter, and they will do all they can for them."

E. S. Johnson, agent of the plaintiffs, swore by affidavit that he was familiar with the terms of credit given by plaintiffs to merchants in Montana; that he had examined all the bills and invoices of goods sold by plaintiffs to defendants, for which this suit was brought, and that there was but one item in all of said bills which was a credit of four months,—that was an item of \$60.43, dated September 21, 1892; that all of said goods sued for in this action were sold on conditional credit of 60 and 30 days, except \$950.55, where the conditional credit applied. He further states that on July 1st he was in Kalispell, and knew that suits and attachments had been instituted against defendants, and upon this information he acted by procuring counsel for plaintiffs. Affiant further denies any agreement between plaintiffs and defendants that the accounts were not due.

J. G. McLean, also an agent of plaintiffs, filed an affidavit denying the agreements as set forth by defendants' affidavits, and stating "that the longest time mentioned, even as a con-

ditional credit, had expired on the whole sum of \$4,966.95 at the time this suit was instituted; but affiant alleges that it was in all bills and invoices of goods sold by plaintiffs to the defendants, for the recovery of which value this action is brought, made a condition, and distinctly printed upon said bills as a part of the contract of sale, that the credit mentioned in said invoice and bills was a conditional credit, which condition was as follows." The conditional credit is then set forth fully. Affiant further states that before this suit was instituted other suits and attachments were issued for large sums of money.

Upon August 29th defendant Whitwell filed a counter affidavit, stating that he bought all the goods for his firm, and that he never assented to the credit memorandum, and that all the statements in relation thereto were false. He then proceeds as follows: "Affiant further says that at the time the said plaintiffs commenced their said action against these defendants, these defendants had not given any lien on any of their property, nor made any assignment, or sold out, or changed or retired from business, but that they were conducting their said business in the usual way; affiant further says that he is informed and believes that no action at law had been commenced against these defendants at the time these plaintiffs commenced their said suit, but that these plaintiffs, acting together with other creditors of the defendants,—Griggs, Cooper & Co., C. Gotzian & Co., W. S. Conrad & Co. and C. R. Groff,—secretly agreed together to commence their said actions in the order in which the same were commenced, and share pro rata in the collections of their said claims, all of the said creditors well knowing that their said claims were in a large part not due. Affiant says, and has reason to believe, that all of said suits were prepared by the same attorneys, at the same time. Affiant further says that at the time the writ of attachment was served on these defendants the attachments for the other above-named plaintiffs were served, and that they were all served at the same time and simultaneously; and further affiant sayeth not."

Newell & Jumper, for plaintiffs, filed another affidavit, in which they stated that said accounts sued on, \$4,016.40, were due by virtue of the expiration of the time credits, and that \$950.55 became due by virtue of suits against the defendants commenced before this action was.

Upon the hearing on the motion to dissolve, the following proceeding was had: "After argument by counsel, and it being admitted in open court by the plaintiffs' counsel that the sum of \$666.84 was due only by virtue of the fact that there was a certain clause placed upon the invoices of goods shipped from the plaintiffs to the defendants by virtue of which the debt would become due, provided the defendants were attached at any time, it was further admitted by plaintiffs' counsel that the invoices of goods amounting to \$666.84 did not have this condition upon them, whereupon the court informed plaintiffs' counsel that he would decide as to that amount the debt was not due, and would dissolve their attachment, unless they amended their affidavit in conformity with the amount that there was actually due. Plaintiffs' counsel contended that there were thirty-seven invoices of goods from plaintiffs to defendants in which the condition for the maturity of the entire debt does appear, and that, even though there were three or four invoices, amounting to \$666.84, on which this condition was absent, yet there were enough invoices in which the condition did appear to work the maturity of the entire debt, and therefore refused to amend. Plaintiffs' counsel further contended that the debt was an entire debt, the court finding that it was not. Plaintiffs' counsel refused the offer to amend, and thereupon the court ordered, adjudged, and decreed that the said attachment be dissolved."

From the order dissolving the attachment, plaintiffs appeal.

McIntire & Clinton and Strevell & Porter, for Appellants.

Under sections 181 and 200 of the First Division of the Compiled Statutes it is not necessary that a plaintiff prove every dollar for which his action is brought, or failing to do that,

have his entire attachment discharged. The law is the exact reverse of such a proposition. The statute is, that the attachment "shall stand as security for any judgment which may be recovered in the action." The statute does not require that the plaintiff should state the amount of his indebtedness. (Drake on Attachment, § 418.) "A statement in the affidavit of a greater amount than is actually due does not vitiate the attachment." (*Lathrop v. Snyder*, 16 Wis. 293; *Tessier v. Lockwood*, 24 N. W. 754.) In the following cases where the action was brought for a greater amount than was actually due, this fact was held to be no ground to dissolve the attachment or to deprive it of its priority over second attachments for the amount which was actually due. (Wade on Attachment, § 219, page 410; *Medes v. Frietess*, 16 Nev. 388; *Felton v. Wardworth*, 7 Cush. 587; *Miller v. Clark*, 8 Pick. 412; *Cox v. Daroson*, 26 Pac. R. 973.) Where the statute required the affiant to state "that the amount of debt or sum demanded was actually due, it was held not to mean that the precise amount stated was actually due but that the day of payment had actually arrived." (*Zinn v. Dzialynzski*, 13 Fla. 597.) "Where the law required the plaintiff to state the amount due, and that no part of the same had been paid, and that he was not indebted to the defendant, it was held sufficient for the plaintiff to state the actual sum due, and that he was indebted to the defendant in a small sum, the amount of which he did not know." (*Tarner v. McDaniel*, 1 McCord, 552; *Holston Manufacturing Co. v. Lea*, 18 Ga. 647; *Ruthe v. Green Bay & M. R. R. Co.*, 37 Wis. 344.) See, also, *Kahn v. Kahn*, 44 Ark. 404; 1 Am. & Eng. Ency. of Law, 903 and note; *Wells v. Morring*, 63 Tex. 340. "Where the affidavit must state simply the existence of a particular fact as a ground of attachment, nothing is requested but a substantial conformity to the language of the statute." (*Wheeler v. Farmer*, 38 Cal. 203; *Reyburn v. Backett*, 2 Kan. 277; *Crawford v. Roberts*, 8 Or. 324; *Dunly v. Schwartz*, 17 Ohio St. 640; *Garver v. White*, 23 Id 192.) The question of whether the debt is due is a question of fact to be determined as other facts in a trial

upon the merits, when that question is raised. (Waples Attachment and Garnishment, page 426.) Drake on Attachment, § 418, says: "On a motion to vacate an attachment for irregularity and improvidence, it is error to vacate it upon a ground which involves the merits of the case." (*Barum v. Bell*, 28 S. C. 201.) "While the merits cannot be questioned on a motion to dissolve an attachment, the defendant may explain any pertinent fact out of which the suit arose, although he also shows that the sum claimed is too large." (*Hamilton v. Johnson* (Nebraska) 49 N. W. 703.) "A motion to vacate an attachment on the ground that no such debt is due, as is claimed in the complaint, will not be granted, as that question can only be disposed of upon the trial." (*Sterns Paper Co. v. Johnson*, 44 N. Y. S. R. 916, 18 N. Y. Supp. 490.) An attachment being in aid, the defense to it, and the principle action are to be made concurrently. (*Leopold v. Steel*, 41 Ill. App. 17.)

P. J. McLaughlin and H. G. McIntire, for Respondents.

The affidavits are radically conflicting in their terms. The judge found the issue in favor of the defendants, and upon well settled principles such finding should not be disturbed. (*Meyer v. Zingre*, 25 N. W. Rep. 727; *Champion Machine Co. v. Updyke*, 29 Pac. Rep. 573.) The application to dissolve the attachment is based upon the ground that it was improperly issued. To entitle a plaintiff to an attachment in Montana he must file an affidavit "showing that the defendant is indebted to the plaintiff upon a contract expressed or implied for the payment of money * * * * * then due, which is not secured by a mortgage, lien or pledge upon real or personal property" * * * (Comp. Stat. p. 104 sec. 181.) The statute, section 200, further provides that defendant may move to discharge an attachment because it was improperly issued; and that such motion may be made upon affidavits, section 201. An attachment is improperly issued when it is based upon a false affidavit or when the statu-

tory grounds for its issuance do not exist. (Drake on Attachments (6th Ed.) §§ 397, 399.) The existence of the statutory grounds authorizing an attachment is a jurisdictional prerequisite, and consequently when the absence of any of those grounds is shown in the way provided by law the attachment falls as a matter of course. An attachment issued upon a false or fatally defective affidavit stands in the same position as an attachment issued without any affidavit. (*Murphy v. Montandon*, 29 Pac. Rep. 851. Drake on Attachment, §§ 86, 87.) It is a well settled principle of the law relating to attachments that when the affidavit recites that the entire indebtedness set out is past due, and it is shown on a motion to dissolve, that a part of it is not due the attachment must fall. (*Meyer v. Zinger*, 25 N. W. Rep. 727; *Meyer v. Evans*, 43 N. W. Rep. 109; *Avery v. Zander*, 13 S. W. Rep. 971; *Cox v. Reinhart*, 41 Tex. 591; *Snyder v. Totham*, 6 Tex. 190; *Garvin v. Hanson*, 55 Wis. 341.) Under the right to procure the dissolution of an attachment any and all the grounds upon which the attachment is based can be inquired into. Such an inquiry does not prevent the parties from still litigating the suit upon its merits, and in such further litigation having the pleasure of a trial by jury, if they desire it. Section 200 clearly justifies the determination of some fact relating to the issuing of the attachment, and if one can be inquired into, we see no reason why all may not be. In *Elling v. Kirkpatrick*, 6 Mont. 119, the falsity of an averment that the debt sued on was not secured was held sufficient to dissolve an attachment, and in *Avery v. Zander*, 15 S. W. Rep. 971; *Clark v. Montford*, 15 Pac. Rep. 899; the fact of the maturity of the debt was inquired into, precisely as in the case at bar, in the latter case appellant's contention in this regard being squarely raised and rejected. (*Windt v. Banniza*, 26 Pac. Rep. 189, and cases cited therein; *Champion Machine Co. v. Updyke*, 29 Pac. Rep. 573. See, also, Drake on Attachment, §§ 397, 399.) The affidavit in attachment in this case is insufficient. Under statute, section 181, an attachment affidavit must *show* the existence of certain facts, among others that the debt sued is upon contract. This

affidavit does not fulfill this requirement. It merely states the affiant's conclusion that defendants are indebted to plaintiffs without reciting the character of the debt or the facts upon which it arose. Such an affidavit as this one has been held insufficient, and the attachment based on it dissolved in *People ex rel Tracy v. Blanchard*, 28 N. W. Rep. 669; Drake on Attachments, § 95; and See *Hershfield v. Aiken*, 3 Mont. 422; *Smith v. Davis*, 29 Hun. 306; *Wilmerding v. Cunningham*, 65 How. 344. The test of the sufficiency of an affidavit in attachment is whether its falsity would expose the party making it to a prosecution for perjury. (1 Wade on Attachment, 55.)

HUNT, J.—Upon the hearing on the motion to dissolve the attachment the court heard no testimony other than the affidavits contained in the statement, hereinbefore recapitulated. We may concede that upon disputed questions of fact, where there is a substantial conflict between the statements made by those who seek to dissolve the attachment and those who try to retain such a lien, the court will not disturb the decision of the district judge, unless it is clearly against the preponderance of evidence; yet we are irresistably led to a conclusion in the case before us, directly opposite to that entertained by the district court. It must be remembered that the case is not one where the witnesses testified in person, and where the manner in which they gave their evidence might have materially aided the trial judge in weighing their credibility. For this reason the case must be decided by this court precisely upon what was before the district court; that is, upon record evidence, and nothing else. (*Robinson v. Melvin*, 14 Kan. 484; *Landsman v. Thompson*, 9 Mont. 182.)

We regard the statement made by the defendants to the effect that plaintiffs were to extend the defendants a credit of \$5,000, and that all sums in excess of \$5,000 were alone to be collected, so long as defendants continued to do business with plaintiffs, as wholly unreasonable on its face. It is incredible that such an unusual agreement, which was a practical loan of \$5,000, never to be repaid if respondents traded with appel-

lants, could have been entered into. But, if our conclusion in relation to this agreement, being of itself improbable, is erroneous, to satisfy us that we are right we have only to refer to the correspondence between plaintiffs and defendants, wherein the defendants, long prior to the time when their credit even approximated the sum of \$5,000, were asking leniency at appellants' hands in collections, and making remittances to the plaintiffs, thanking them for past favors, and promising to clear their accounts up. In one letter, quoted in part in the statement of the case, defendants ask plaintiffs not to "crowd them." It naturally suggests itself, why should the defendants ask the plaintiffs not to crowd them when they only owed plaintiffs about \$3,000, and under their agreement, as contended for, there could be no indebtedness collected until a maximum credit of \$5,000 had been incurred?

The statements of several witnesses for the plaintiffs all go to show that the credits extended were for less than four months, with but one exception; and that the moneys were due for each and every invoice, prior to the institution of this action, except for the amount of those invoices which only became due by virtue of the happening of the contingency provided for in the credit memoranda.

In relation to the goods sold to the defendants for the \$950.55 due on such memoranda of credit, we think the weight of testimony is clearly on the side of the plaintiffs.

It appears by the affidavits of Johnson and McLean and others that the terms of credit upon goods sold on invoices, to the amount of \$4,016.40, had expired, and that without any credit condition that sum would be due; but that in all the invoices of goods sold by plaintiffs to defendants and sued for in this action, the conditional credit was printed upon the bills, and made part of the contract of sale, and that the sum total of the amount due upon goods sold under the conditional credit agreement exceeded the sum total of the amount sued for.

It further appears that certain goods were sold for cash in the course of transactions between the parties, and that of

thirty-seven invoices sent by plaintiffs to defendants in the course of the dealings, all but three or four had the credit memoranda appearing upon the face of the invoice. We can but think that the argument of plaintiffs is reasonable and fair, when they say that the only invoices which did not contain the memoranda of credit clause were cash transactions between the parties, and are therefore immaterial in considering this motion in the suit. Such a view conforms with the several statements made by plaintiff's witnesses, which statements are not successfully controverted by the defendants. The statement by the defendants that their attention had not been called to the credit clause is entitled to very little or no weight. We cannot believe that a mercantile firm would be so careless in reading its invoices as to overlook such an unusual and important condition on so many invoices of goods sent them.

There is an attempt on the part of the defendants to deny that the claims apparently not due did not become so by virtue of any suits against defendants; but this portion of the affidavit of defendant Whitwell is evasive, and evidently sham, because he does not contradict what is averred to be shown by the records, namely, that Griggs, Cooper & Co., and others, had instituted suits against his firm before plaintiffs sued. His statement that these plaintiffs and other creditors secretly agreed to commence their actions in the order in which the same were commenced, and share *pro rata* in the collections of their claims, all of said creditors well knowing that their said claims were in a large part not due, is in itself a contradiction of the averment that no suits had been instituted. A careful reading of the aforesaid affidavit of defendant Whitwell, filed August 29, 1893, will demonstrate the falsity of its contents, provided, of course, summons had been served upon the defendants, of whom he was one, in the proceedings to which he himself refers in a part of his affidavit on the motion to dissolve.

The respondents argue that the plaintiffs' counsel in open court admitted that \$666.84 of the account sued on was not due, and, although opportunity was offered the plaintiffs to

amend, they refused to do so. We do not construe the attitude that the plaintiffs assumed, which is exactly set forth in the statement of facts, to be an admission of the fact that \$666.84 of the *debt sued for* was not due, inasmuch as counsel expressly restricted their admissions to the statement that that amount was due only by virtue of the credit memoranda clause upon the invoices. Plaintiffs' counsel did admit that the invoices amounting to \$666.84 did not have the credit condition upon them; but further stated that there were 37 invoices in which the condition of credit did appear, and that, notwithstanding the fact that three or four invoices, amounting to \$666.84, did not have that condition, yet there were enough invoices upon which it did appear to make the entire debt sued for due. Under such a contention made by the plaintiffs, and not directly and specifically controverted by any affidavits of the defendants, we think that it was error on the part of the district judge to put the plaintiffs upon an election requiring them to either amend their affidavit in attachment, or submit to a dissolution thereof.

Our conclusion is that, upon all the facts as they appeared before the learned judge of the district court, the affidavits of respondents presented no substantial conflict with the statements of the plaintiffs, and contained many statements so highly improbable as to deny to them claims to belief. (*Landsman v. Thompson, supra.*)

Respondents next argue that the affidavit upon which the attachment in this case was issued is fatally defective, upon the ground that part of the claim was not due; but this argument is based upon the hypothesis that the ruling of the court was correct that \$666.84 of the amount sued for was not yet due. Our opinion upon the merits renders it unnecessary to discuss the question of whether or not an attachment is void where the affidavit states that a greater sum is due than is subsequently determined to be due. We think, however, that under the weight of authority, where a person has, in good faith, made a mistake in the amount of the indebtedness, to secure which the attachment was issued, it is within the power

of the court to permit an amendment to be made, and judgment to be entered in the proper sum, and that the plaintiff should not lose his whole lien because of an inadvertent error.

The procuring of an attachment is a proceeding within the spirit of the Code, and, if such proceeding is defective, the same may be amended in the furtherance of justice, like any other proceeding, under section 116. (*Pierse v. Mills*, 5 Mont. 550; *Magee v. Fogerty*, 6 Mont. 237; *Joseph v. Clothing Co.*, 13 Mont. 195; *Peiffer v. Wheeler*, 76 Hun. 280, 27 N. Y. Supp. 771; *Insurance Co. v. Dimmick* (Sup.) 22 N. Y. Supp. 1096; *Maxw. Code Pl.* 585; *Struthers v. McDowell*, 5 Neb. 491.)

The legislature has not only failed to disapprove of these repeated judicial interpretations of the attachment laws, but has expressly sanctioned them by the adoption of a provision in the new Code of Civil Procedure, passed in 1895, permitting amendments to the affidavit in attachment. (§ 916, Code of Civil Procedure.)

Finally, we are asked to declare the affidavit in attachment in this case wholly insufficient, because, under section 181, Code of Civil Procedure, the affidavit must show the existence of certain facts,—among others, that the debt sued on is upon contract. The amended affidavit filed pursues the usual course of simply stating the affiant's conclusion, namely, that defendants are indebted to plaintiffs in the sum of \$4,966.95, with 10 per cent. per annum interest thereon from the 28th day of August, 1893, upon an express and implied contract for the payment of money, which is now due from defendants to plaintiffs. But we think that such an affidavit is sufficient. Under our statutes the clerk must issue the writ of attachment when the affidavit required by law has been filed, and the necessary undertaking has been given. It certainly was not contemplated by the statute that the clerk should exercise more than a ministerial duty in issuing a writ of attachment; and, where the ultimate facts are set forth as fully as they were in this case, the statute has been substantially complied

with. (*Wheeler v. Farmer*, 38 Cal. 203; *Bank v. Boyd*, 86 Cal. 386; *Gutman v. Iron Co.*, 5 W. Va. 22; Drake on Attachment, § 98; 1 Wade on Attachment, pp. 120, 131; *Weaver v. Haywood*, 41 Cal. 118; *Cranford v. Roberts*, 8 Or. 324.) Under a statute substantially like ours, requiring an affidavit showing the nature of the plaintiff's claim, it has been held reference may be had to the complaint where the statement is not as full in the affidavit as may be desired. (*Hart v. Barnes*, 24 Neb. 782, 40 N. W. 322; Drake on Attachment, § 95; Waples on Attachment, page 87.)

We might rest the decision of this case upon the views hereinbefore expressed. An important question of practice, however, was ably presented to the court as the principal one involved, and, in view of the fact that we have given to it a very careful examination, it is proper that we express what seems to us to be the better view of the point raised.

By the affidavits used on the motion to dissolve, the real issue between the parties was whether the debt sued on by the plaintiffs was due wholly or in part. To determine this issue involved a consideration of the entire merits of the controversy between the parties. We are not prepared to believe that such a determination can be had on a motion to dissolve an attachment. By section 200 of the Code of Civil Procedure the only ground upon which an attachment may be discharged is that the writ was improperly issued. If this statute were standing by itself, we doubt whether any inquiry could be had beyond what might be apparent by the records in the case before the court; but the law evidently contemplates a further examination, for, by sections 201 and 202, the motion to discharge an attachment on the ground that the writ was improperly issued may be made upon affidavits, as well as upon the papers themselves; and the plaintiff may oppose these affidavits by counter affidavits, or other evidence, in addition to those on which the order of attachment was made. We therefore think that an attachment can be dissolved for irregularities or imperfections in its issuance, not only apparent upon the writing and the printing contained in the papers, but upon other

grounds, wherein it is made to appear that the issuance of the writ has been improper or irregular.

But how far can the investigation under the motion go, and how restrictive or how liberal are the terms of the statute? If, for instances, the notary taking the oath of the plaintiff to the affidavit was not in fact a notary; if on the same demand a second writ has been issued in the same county; or where the bond was not signed by those purporting to have signed it; or where the party making oath to the affidavit as the agent of the plaintiff was not in fact his agent; or perhaps in other instances, where the writ is founded upon facts not the same ones constituting the cause of action, and where a decision upon such facts is not a decision upon the identical issue to be tried to a jury, and upon which plaintiff's right of action solely depends,—we think that a motion to dissolve the attachment upon the ground that it was improperly issued is contemplated by the statute, and in such instances affidavits may be resorted to to properly place before the court the information necessary for it to have in order to base a finding upon that the writ has been improperly issued, and to make an order of discharge. But we do not think that it is within the terms of the statute, or within the scope of an inquiry into whether there has been an improper issuance of the writ, for the district court to try the merits of the main action in a motion to dissolve the attachment. If it were, the court, by the expression of an opinion upon disputed questions of fact, could, on a motion to dissolve to-day, render a judgment involving the merits of the suit, which the law says a jury alone can do to-morrow, if either party elects to have a jury.

It is urged that an attachment proceeding is but ancillary to the main action, and that a trial upon that issue does not affect the merits of the suit. This is true, but it does not dispose of the anomalous position to which the defendants' reasoning carries us, if the judge may try the facts and destroy the entire value of the plaintiff's judgment by dissolving the attachment, thus declaring it improvidently issued; while a jury, upon precisely the same testimony, and upon the identical issue,

might decide contrary to the judge, and award the plaintiff a verdict for all he asks, upon the ground that the debt is due. Or, to carry the illustration further, after the defendants have had the motion to dissolve sustained because the debt was not due, they might default as to the action, and thus confess it was due. Under such conditions what would plaintiffs position be? By the previous ruling of the judge on the merits his debt was not due, but by the default, or if tried by the jury on the merits, his debt was due. Between this legal game of battle-door and shuttlecock, he would have a judgment good only in form, without any substance wherewith to satisfy it. It may be that cases will arise where it is difficult for the trial court or judge to say whether the facts, when disputed on a motion to dissolve, are the same ones upon which the cause of action depends. But, notwithstanding such occasional perplexities, we believe that our construction of the statutes is the correct one, and that far less injurious consequences will flow from pursuing the rule laid down herein than would from holding that the statutes permit the directly disputed issues of the main suit to be adjudicated by the trial court upon *ex parte* affidavits, and thus too often destroy the object of the suit itself,—the collection of a debt.

This question has been considered by the supreme court of New York a number of times within the past few years. In *Lowenstein v. Salinger*, 17 N. Y. Supp. 70, it was held that the court would not ordinarily, on motion to vacate an attachment, try questions regarding the cause of action which should properly be left to be determined on a trial. This ruling is approved of by the same court in *Brown v. Wigton*, 18 N. Y. Supp. 490, where the court refused to dissolve an attachment because the affidavits raised the merits of the controversy.

In *Stearns Paper Co. v. Johnson*, 18 N. Y. Supp. 490, it was sought to vacate an attachment on the ground, according to the affidavit of the defendant, that there was no such debt due as was claimed in the complaint. It was held that was a question which could only be disposed of upon the trial, and could not be considered

by the court, as the facts were not undisputed, nor were the legal conclusions certain.

In *Johnson v. Harwood D. & T. Co.*, 29 N. Y. Supp. 797, on an appeal from an order denying the motion of appellant, a junior attaching creditor, to vacate the plaintiff's action, the supreme court adhered to the principle laid down in the decisions just cited, and refused to dissolve the attachment on the ground that the court would not, on such an application, pass upon the merits of the action.

The last case which we have been able to discover is that of *Kirby v Colwell*, reported in 81 Hun, 385, 30 N. Y. Supp. 880, and decided in October, 1894. A motion was there made to vacate an attachment, solely upon the ground that plaintiff had no cause of action against the defendants, and the affidavits presented in support of the motion denied the contract pleaded, or the rendition of the services, which were the basis of the plaintiff's complaint. The trial judge vacated the attachment, but the supreme court held that when, upon a motion of this character, the only question presented relates to the existence of plaintiff's alleged cause of action, and is one of fact, and not of law, it should be left for determination at the trial, and not be decided upon affidavits.

We believe the New York rule to be the correct one, subject to the qualifications hereinbefore discussed, and generally to the further qualification that, "where the facts are undisputed, and the legal conclusions certain, it would be oppressive to hold an attachment which is clearly without foundation." (*Lowenstein v. Salinger, supra.*)

The case of *Elling v. Kirkpatrick*, 6 Mont. 119, was clearly within the New York rule. The facts therein upon which the motion to dissolve the attachment was made were written legal instruments. They were such as would lead up to certain legal conclusions, and addressed themselves entirely to the consideration of the court, and not a jury. See, also, *Herrmann v. Amedee*, 30 La. Ann. 393, where it was held that the defendant might put in issue, and require to be passed upon, the allegations of the plaintiff's affidavit, on which the writ itself is is-

sued, without reference to the merits; but where the petition shows a cause of action, although the allegations are not true in fact, or the defendant has defenses on which the demand of plaintiff may be defeated on the merits, neither the truth of the allegations nor the defense on the merits can be inquired into on the rule to show cause. The general doctrine is also recognized in *Carnahan v. Gustine* (Okl.) 37 Pac. 594, although in that case the court follow the Kansas cases, and *Rosenberg v. Burnstein* (Minn.) 61 N. W. 684; *Miller v. Chandler*, 29 La. Ann. 88; *Reiss v. Brady*, 2 Cal. 132; *Drake on Attachment*, § 418. An analogy, too, may be found in a hearing on an order of arrest against a debtor. (*Griswold v. Sweet*, 49 How. Prac. 171.)

Several cases cited by the respondents seem to hold that there may be a trial of the merits on the motion to dissolve. The early Kansas cases, *Robinson v. Melvin*, 14 Kan. 484 and *Burdrem v. Denn*, 25 Kan. 430, upon critical examination, scarcely go as far, we think, as the respondents would have the court go in this case. If they do, we hold that they do not state the law correctly, as applied to our statute. But in considering the Kansas cases it is highly important to note that under paragraph 4323, Gen. St. Kan., a defendant may, at any time before judgment, move to discharge an attachment as to the whole or part of the property attached, without statutory limitations, such as Montana has, to the grounds upon which the motion may be based. The statutes of Nebraska (§ 4745, Consol. St. Neb.) also permit a motion to discharge a writ of attachment on exactly the same grounds as the Kansas statutes, with no express limitations, and yet the supreme court of Nebraska held, in *Olmstead v. Rivers* (1879) 9 Neb. 234, 2 N. W. 366, that, where a motion was made to discharge an attachment on the ground that the debt was not due at the commencement of the suit, the truth or falsity of the statement "cannot be inquired into on a motion to dissolve the attachment. That question can be settled only on a trial of the issues under the pleadings." The late Kansas cases proceed upon the doctrine of *stare decisis*.

In Pennsylvania and several other states the statutes confer the power on the court or jury expressly to hear evidence, or determine the truth of the allegations contained in the affidavit upon which the writ is issued, and to dissolve or continue the liens of such attachments, according as he or they shall find the allegations of such affidavit sustained or otherwise. (*Walls v. Campbell* (Pa. Sup.) 17 Atl. 422; *Woods v. Tanquary* (Colo. App.) 34 Pac. 737; chapter 6, Code Colo. 1887.) The case of *Avery v. Zander*, 77 Tex. 207, 13 S. W. 971, relied on by respondents, held that where the complaint, on its face, showed that certain of the claims were not due, and the affidavit alleged that the defendant was indebted to the plaintiff in the aggregate amount sued for, without specifying what part of the claims were due, and what part were not due, an attachment was properly dissolved. But the court overlooked an important point in the case. After the original suit was instituted, by leave of court the plaintiff filed an amended petition, precisely as was done in the case at bar, describing with greater particularity the claim sued on, and showing what part was due and what part was not due. There is nowhere throughout the opinion any allusion to this amended complaint, and the ruling of the lower court was sustained wholly upon the ground that the original complaint and affidavit showed part of the claim was not due.

To conclude, it may be that our views upon the proper limitations to be put upon an inquiry whether an attachment has or has not been improperly issued will, upon a positive decision of the question be somewhat modified. But we are inclined to think that if such modification ever be had, it will be in restricting the scope of the inquiry upon motion to dissolve before trial, rather than in extending it.

The order of the district court dissolving the attachment is reversed.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

GRIGGS ET AL., RESPONDENTS, v. KALISPELL MERCANTILE COMPANY, APPELLANT.

[Submitted May 15, 1896. Decided June 3, 1896.]

(See syllabus in *Newell v. Whitwell*, ante, page 248)*Appeal from Tenth Judicial District, Flathead County.*

DEFENDANT'S motion to dissolve the attachment was denied by DuBOSE, J. Affirmed.

H. G. McIntire and P. J. McLaughlin, for Appellant.

C. H. Foot and Stevell & Porter, for Respondents.

HUNT, J.—Suit for money due on promissory note and open account. Attachment issued. Motions to dissolve were filed by defendants, raising substantially the same legal questions discussed and decided in *Newell v. Kalispell Mercantile Co.*, ante, page 243. No question of fact arose, however, herein, upon the argument or at all, as appears in the *Newell* case, wherein the court required plaintiffs to elect to reduce the amount claimed in their affidavit, or submit to a dissolution of their attachment. The district court overruled the motion to dissolve on the legal question presented, evidently construing the law of amendments as we do.

As the principal points presented in this case are passed upon in the opinion of the *Newell* case, *supra*, upon the authority of that decision the order of the district court refusing to dissolve the attachment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

BERG ET AL., APPELLANTS, v. KOEGEL ET AL., RESPONDENTS.

[Submitted May 16, 1895. Decided June 3, 1895.]

MINES AND MINING—Location notice—Affidavit.—An affidavit to the declaratory statement of a quartz location, which shows that the statement was sworn to one year before the location of the lode, is fatal to the validity of the location in the absence of proof that the affidavit was wrongly dated by mistake of the notary.

SAME—Case affirmed.—The case of *McCowan v. Maclay*, ante, page 234, holding that section 1477, Fifth Division, Compiled Statutes, requiring declaratory statements of quartz locations to be made on oath, is not in conflict with the laws of the United States upon the subject of mining claims, affirmed.

Appeal from Fifth Judicial District, Jefferson County.

ACTION to quiet title to a mining claim. Defendants motion for a nonsuit was granted by SHOWERS, J. Affirmed.

John S. Miller, for Appellants.

DEWITT, J.—This is an action brought by plaintiffs to quiet their title in and to certain mining premises against the claims of defendants to the same premises. The plaintiffs were nonsuited, and judgment entered for defendants, from which judgment this appeal is taken.

One of the grounds for the nonsuit was the defect in the location notice of the plaintiffs. The location notice was dated January 1, 1891. It was verified, as appears by the affidavit, January 1, 1890. It was recorded January 2, 1891. The testimony shows that the discovery and location was made January 1, 1891. Therefore it appears by the recorded notice that it was verified a year before the discovery and location of the claim. There was no attempt made upon the trial to show that the affidavit was wrongly dated by mistake of the notary. The only testimony upon the subject of when the notice was made out is the testimony of a witness who stated that it was made out the last day of January before he went upon the ground. As he went upon the ground and located the claim in January, 1891, it was probably a mistake of the transcriber

when he made the testimony to appear that the notice was made out the last of January. The witness probably said the last of December. But, in any event, the verification itself shows the date one year prior to the location, and the best that the evidence does to help the plaintiffs shows that the verification was **made certainly before the location**, for the witness says that it was made out and sworn to before the location was made. Our statute (section 1477, div. 5, General Laws) provides that a person making a discovery and location of a quartz lode vein shall file a declaratory statement thereof on oath. A declaratory statement on oath, made perhaps a year, and at least some time, before the discovery and location, is certainly not a declaratory statement of the location. A person surely cannot make affidavit of facts before the facts came into existence.

We are therefore of opinion that the testimony of the plaintiffs themselves showed that they had not made or filed a declaratory statement on oath of the discovery or location of their claim. The court therefore properly granted the nonsuit. This decision is made upon the authority of *McCowan v. Maclay*, *ante*, page 234, to the effect that our statute requiring the location notice to be verified is not in conflict with the laws of the United States upon the subject of the location of mining claims. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

LEWIS, RESPONDENTS, v. WEYERHORST, APPELLANT.

[Submitted, May 17, 1896. Decided June 3, 1896.]

PLEADING—Sufficiency of denial.—The denial on information and belief of a material fact not presumptively within the knowledge of the pleader, is sufficient to present an issue, under section 89, Code of Civil Procedure, providing that the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant.

Appeal from Second Judicial District, Silver Bow County.

ACTION on promissory note. Plaintiff's motion for judg-

ment on the pleadings was sustained by McHATTON, J. Reversed.

Statement of the case by the justice delivering the opinion.

This is an action on two promissory notes. The complaint alleges that defendant executed and delivered these notes to Robert Grix on the 10th day of June, 1891; that on the 23d day of June, 1893, the said Grix assigned said notes, and all claims thereunder against the defendant, to the plaintiff for value, and that plaintiff is the owner and holder thereof. The answer denies specifically, on information and belief, that said notes were ever assigned by said Grix to the plaintiff, for value or at all. Plaintiff moved the court for judgment on the pleadings. This motion was sustained, and judgment entered against the defendant for the amount of the notes and costs. From this judgment the defendant appeals.

Oliver M. Hall, for Appellant.

The denials were sufficient. (*Noonan v. Bradley*, 9 Wall 394; *Pinkham v. McFarlin*, 5 Cal. 137; *Stern v. Martin*, 4 Cal. 227; *White v. Brown*, 14 How. Pr. 282, *Russell v. Clapp*, 7 Barb. 482; *Maclay v. Sands*, 94 U. S. 586.)

Charles O' Donnell, for Respondent.

A mere denial in the answer that plaintiff is the owner and holder of the note is irrelevant and sham. (*Cutler v. Gunter*, 1 Denio 268; *Seely v. Engle*, 17 Barb. 530; *Edson v. Dillaye*, 8 How. Pr. 273.) Where the averment of ownership in the complaint is absolute and unequivocal and supported by the oath of positive knowledge, and that in the answer is on information and belief, defendant on a motion to set aside the answer as sham, is bound to support his averment by the oath of a party having knowledge. (*People v. McCumber*, 15 How. Pr. 189; *Hance v. Rumming*, 2 E. D. Smith, 48 and 49; *Chapin v. Palmer*, 12 How. Pr. 37-39; *Corbet v. Eno*, 13 Abb. Pr.

65; *Wedderspoon v. Rogers*, 32 Cal. 569; *Randolph v. Harris*, 28 Cal. 562.)

PEMBERTON, C. J.—The question presented by this appeal is whether the specific denial, on information and belief, contained in the answer, of the assignment of the notes sued on, presented a material issue for trial.

Section 89, Code of Civil Procedure, provides: "If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant."

Section 96, Code of Civil Procedure, provides that: "The affidavit of verification shall state that the facts stated in the pleading are true to the knowledge of the person making it, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true."

In *MacLay v. Sands*, 94 U. S. 586, the supreme court, in construing the statutes above referred to, say: "The denial, when made, must be specific, but it is none the less specific because based on information and belief. Provision is made for an issue by a formal denial, where sufficient knowledge or information upon which to base a belief cannot be obtained. This implies that, if the necessary information can be obtained, a statement must be made predicated upon that, and, if it is to be made, we cannot see what harm can result from adding the grounds on which it is based. It is the same for all the purposes of an issue whether the qualification is given or not, and the issue is the material thing to be attained. But section 63 seems to us to be conclusive upon the propriety of the practice. There provision is made for one form of verification if the statement is upon personal knowledge, and another if upon information and belief. Why this, if information and belief in a proper case were not sufficient to justify an averment? But, unless the pleading shows that the statement is founded upon information, etc., the form of the oath prescribed would be of no avail, because that contemplates a

positive verification in all cases where it does not appear in the body of the pleading that a qualification is intended. In some states, the practice acts require a verification only to the effect that the party believes his statements to be true. In such cases there is no necessity for qualifying the averments in the pleading, because the oath prescribed established all the limitation that is necessary. In Montana, however, the qualification must be made in the pleading. * * * We think, therefore, that the denial upon information and belief was sufficient to present an issue for trial, and that the court erred in deciding otherwise." Section 63, referred to *supra*, is now section 96 of the Code of Civil Procedure. See, also, to the same effect, *Stacy v. Bennett*, 59 Wis. 234, 18 N. W. 26; *Meadowcraft v. Walsh*, 15 Mont. 544.

To entitle plaintiff to recover in this action it was necessary for him to allege an assignment to him of the notes sued on. If so, it was essential that he prove the assignment, if the answer contained a specific denial thereof.

The assignment of the notes by Grix to the plaintiff was not a matter presumptively within the knowledge of the defendant, and, if not, then the defendant was permitted, under our statutes and the authorities, to deny the same on information and belief, and such denial presented a material issue for trial. We think the court erred in holding otherwise, as it did by rendering judgment on the pleadings.

The judgment is reversed, and the cause remanded for trial.

Reversed.

DE WITT and HUNT, JJ., concur.

STATE EX REL. GRAHAM, APPELLANT, v. BOARD OF
COMMISSIONERS OF CASCADE COUNTY,
RESPONDENT.

[Submitted June 3, 1895. Decided June 10, 1895.]

JUDGMENT AGAINST COUNTY—How paid—Mandamus.—Under section 751, Fifth Division Compiled Statutes, providing in effect, that execution shall not issue on a judgment against a county but the same shall be levied and paid by tax or other county charge, mandamus will not lie at the relation of a judgment creditor to compel payment of his judgment which was not recovered until after the levy for that year had been made, but the amount thereof shall be included in the statement of county expenses for the current year and is entitled to payment after the next levy based thereon.

Appeal from Eighth Judicial District, Cascade County.

APPLICATION for mandamus to compel payment of a judgment against a county. The writ was denied by BENTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Mandamus. Relator applied to the district court for an alternative writ of mandate commanding the board of county commissioners of Cascade county to adjust, settle, audit, and order a warrant drawn for the payment of a judgment duly recovered by relator against defendant in the district court of Cascade county, for \$400 and costs, on Nov. 7, 1894. Relator sets forth that repeatedly since said judgment was rendered he has demanded payment and settlement of the same "according to law," but that the defendant refused to pay or settle such judgment; that there are sufficient funds in the road and general funds of the county treasury unappropriated, and out of which the said board can pay said judgment; and that it is the legal duty of the board to pay the same.

The defendant, by answer, denies that there are or were any funds in the treasury of the county at the time of answer (March 29, 1895), unappropriated, as alleged by relator, and

denies that it can lawfully pay said judgement out of the road or general funds, or any other funds, before the regular payment of taxes to the said county before December 1, 1895. In further answer defendant pleads that, in case the judgment is a valid one, it has imposed on it the duty of levying taxes to pay the same as other county charges are provided for in their payment, under the provisions of section 751, c. 39, div. 5, Comp. St.; that said judgment had no existence prior to November 7, 1894, and then the levy had been made for all charges against said county for that year; that the next levy has yet to come during 1895, and has not been made, nor will the taxes thereunder be paid before the latter part of the year, and all moneys now in the treasurer's hands have been appropriated for charges against the said county existing prior to the rendition of said judgment, and that under section 751 of the Statutes, defendant has until the levy and collection of said taxes yet to be collected, or until 60 days after the time in which they should be paid, to discharge said judgment, if it is a valid one.

To this answer a demurrer was filed, general and special. The court overruled the demurrer. Relator declined to plead further, whereupon relator's application for a peremptory writ was denied. Relator appeals.

F. C. Park and B. F. Turner, for Relator.

Counsel cited: *State v. Commissioners* (Nev.) 35 Pac. 300; *Territory v. Commissioners*, 6 Mont. 147; *Alden v. Alameda Co.*, 43 Cal. 270; *Johnson v. Supervisors*, 65 Cal. 481.

Henri J. Haskell, Attorney General, for Respondent.

HUNT, J.—This case turns upon the construction of section 751, div. 5, Compiled Statutes. That section reads as follows: "When a judgment shall be rendered against the board of county commissioners of any county, or against any county officer, in an action prosecuted by or against him in his name of office, when the same shall be paid by the county, no execu-

tion shall issue upon said judgment; but the same shall be levied and paid by tax or other county charges; and when so collected shall be paid by the county treasurer to the proper person to whom the same shall be adjudged, upon the delivery of a proper voucher therefor: provided, that execution may issue on said judgment if payment be not made within 60 days after the time required for the payment of county taxes to the county treasurer, by the proper officers of said county in each year."

We are of opinion that it was proper for the board of commissioners of the county to decline to pay the judgment until the amount thereof was levied and paid by tax, as other county charges are levied and paid, namely, by levy based upon the amount of property in the county, as returned by the assessor, and a statement of the county expenses for the current year. Where incidental expenses, not especially embraced within the provisions of any particular statute, arise, doubtless they are covered by sums collected in taxes and required to be set apart by the board of commissioners, and known as the contingent or other specific funds of the county. But the payment of a judgment is especially provided for, and the amount thereof should be included in the itemized statement of county expenses for the current year, at the time that the board of commissioners make their annual levy.

This method is plain, adequate, and certainly exclusive, where the funds already collected are necessary to pay the ordinary current expenses of the county. It may not be as speedy in this one instance as relator would like to have it, but it is certain, and the delay is compensated for by the rate of interest the judgment bears.

The policy of the statute is manifest. If large judgments could be paid at once, before levy by tax, by reason of the commissioners not having provided for such emergencies by their levy, the credit of the county might be seriously impaired, and creditors whose claims were for ordinary expenses, contemplated when the levy was made, might be unjustly forced into the lists of deferred creditors by the superior claim of a

judgment creditor, whose warrant or claim might exhaust the cash fund.

The California and Nevada cases cited by appellant are under statutes dissimilar to that of this state.

The defense of no funds in the treasury, except such as are necessary to pay the current expenses of the county for the ensuing year, was properly pleaded. (High on Extraordinary Remedies, § 352.)

The judgment of the district court is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE EX REL. MUTUAL BENEFIT LIFE INSURANCE
COMPANY, RELATOR, v. FIRST JUDICIAL DISTRICT COURT, RESPONDENT.

[Submitted June 3, 1895. Decided June 10, 1895.]

RECEIVER—Mandamus—Sufficiency of answer.—A writ of mandamus, commanding the district court to hear testimony or proof in support of an application for the appointment of a receiver in an action to foreclose a mortgage, in which issue was joined as to the sufficiency of the property to discharge the mortgage debt, will be dismissed on demurrer, where the answer to the writ set forth that at the time of the hearing the application no reasons were given why a receiver should be so appointed, except that it was alleged in the complaint that "the condition of the mortgage had not been performed," and that "the property was probably not sufficient to discharge said mortgage debt;" that ample opportunity was given plaintiff to present any other reasons, but none were presented to the court nor any offer of proof or witnesses made, the plaintiff relying solely upon the pleadings.

APPEAL—Opinion of trial court.—The opinion of the district court is not a finding, nor a part of the judgment, so as to require its review by the appellate court when contained in the record.

APPLICATION for writ of *mandamus* to compel the district court to hear proof, and determine on its merits an application for the appointment of a receiver. Writ denied.

Statement of the case by the justice delivering the opinion.

The object of this action is correctly stated in the opening

paragraph of the brief of the relator, as follows: "This is an application for a writ of *mandamus* to compel the district court of Lewis and Clarke county (department No. 1), to assume jurisdiction of, and hear and determine on its merits, an application or motion for the appointment of a receiver in an action now pending in said court in which the relator herein is plaintiff, which action was brought to foreclose a real estate mortgage."

Relator commenced an action in the district court against Peter Winne *et al.* to foreclose a mortgage. Our statute in reference to receivers provides: "A receiver may be appointed by the court in which the action is pending, or by the judge thereof: * * * Second. In an action by a mortgagee for the foreclosure of his mortgage, and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." (Code of Civil Procedure, § 229.) It was alleged in the complaint in the action to foreclose that the conditions of the mortgage had been broken, and, furthermore, that the property was probably insufficient to discharge the mortgage debt. That the property was probably insufficient to discharge the mortgage debt was denied in the answer.

The plaintiff gave notice that it would move the court for an order appointing a receiver, and that the motion would be made upon the pleadings, and upon oral testimony to be taken and introduced on the hearing of said motion. Thereupon the district court ordered that oral testimony might be introduced upon the hearing of the motion in support thereof and in opposition thereto.

The application for a writ of *mandamus* sets forth that the court refused to hear testimony or proof in support of the application for the appointment of a receiver, and denied said application. The writ of *mandamus* was issued from this court commanding the district court to entertain and assume jurisdiction of said motion for the appointment of a receiver, and

to hear proof, either oral or by affidavit, and to determine said application upon the merits, or show cause before this court why it has not done so. The district court makes answer to the writ, and denies that it ever refused to entertain jurisdiction of the application for the appointment of a receiver, and that it ever refused to hear proof upon the application.

The answer further sets forth that, at the time set for the hearing, the plaintiff applied for the appointment of a receiver, which motion was oral, and contained no reason therefor, "nor were any reasons at any time given why a receiver should be so appointed, except that it appeared from the pleadings that 'the condition of the mortgage has not been performed,' and the allegation in the plaintiff's complaint, contained in paragraph 19 thereof, 'said property is probably not sufficient to discharge said mortgage debt.' Ample opportunity was given the plaintiff to present any other or additional reasons, if any existed, but no such were offered or presented to the court, the plaintiff relying solely upon the pleadings in said cause." It is further set up in the respondent's answer as follows: "No grounds were presented, save those made in the complaint, or offered by the plaintiff, no offer of proofs upon any ground was made, no witnesses were produced or offered after said motion was made, nor was there any action taken in the matter of application for a receiver, except the argument referred to, and the submission of the same by agreement of counsel to this court, upon the pleadings and argument aforesaid."

The action taken by the court appears in its answer, as follows: "That thereafter, and on the 3d day of May, 1895, after due consideration of all of said matters then pending, having theretofore taken jurisdiction thereof, and having heard all that the plaintiff had offered or expressed any desire to offer, and its argument therein, I did, on the 3d day of May, 1895, make the following order, which appears on pages 283 and 284 of the records of said district court, as follows: 'In this case plaintiff's motion for the appointment of a receiver is denied, and it is further ordered that the order heretofore

made restraining defendants from collecting the rents, issues, and profits is hereby set aside, to which ruling of the court plaintiff excepted.' "

The relator demurs to the answer on the ground that it does not set up a defense to the application for a writ of mandate. This is the matter now for consideration.

McConnell, Clayberg & Gunn, for Relator.

A. K. Barbour and J. W. Kinsley, for Respondent.

DE WITT, J.—The writ of *mandamus* may be invoked to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station. (Code of Civil Procedure, § 566.) The writ of *mandamus* may require the district court to act.

We are of opinion that the answer of the court in this case shows that the court did act upon the application for the appointment of a receiver. The demurrer confesses that all the allegations of the answer are true. It is therefore true that the court gave all the parties ample opportunity to introduce oral or other testimony upon the point of whether the mortgaged property was probably insufficient to discharge the mortgage debt. It is true that the parties refused to offer any such testimony. Therefore, all that the court had before it was the affirmation of the complaint that the property was probably insufficient to answer the debt, and the denial of this affirmation by the defendant's answer. Upon these pleadings the court acted, and refused to appoint a receiver.

It is of course conceded that by this writ of mandate we are not asked to review the exercise of judgment and discretion of the court. As the record is before us, the writ of *mandamus* must be dismissed. The answer of the court is a complete defense to the application for the writ. Instead of the court's having refused to act, it did act upon what was before it, to wit, the pleadings, and gave ample opportunity to relator to offer any other matter in support of its application, which the relator refused to do. There have been several points argued

by counsel, which we do not think are in the case. Nor do we consider it necessary to express our views as to the opinion of the district court which was filed in denying the application for a receiver. The opinion of the district court is not a finding, nor a part of the judgment. (*Thorp v. Freed*, 1 Mont. 651; *Fant v. Tandy*, 7 Mont. 443; *Muller v. Buyck*, 12 Mont. 356; *Horsky v. Moran*, 13 Mont. 250.) Judgment was upon the pleadings. The court acted. Whether the reasons of the court were right we need not inquire. (*Thorp v. Freed*, *supra*.) The result was right.

The answer of respondent being confessed to be true by the demurrer, and it being a defense to the application, it is ordered that the writ be dismissed.

Writ dismissed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE EX REL. NORTHWESTERN NATIONAL BANK
OF GREAT FALLS, RESPONDENT, v. DICKERMAN,
COUNTY TREASURER, APPELLANT.

[Submitted June 4, 1895. Decided June 10, 1895.]

SCHOOLS—*Bonds of school district—Form of warrant.*—Section 1951, Fifth Division of the Compiled Statutes, provides that when bonds are issued by a school district, "they shall bear the signature of the chairman of the board of trustees, and shall be countersigned by the clerk," and when a warrant in such form is drawn by the board of trustees of a school district on the county treasurer, it is sufficient as to form.

FRAUD—*Pleading—Striking out answer.*—Where an answer alleges fraud, and contains other allegations which are absolutely contradictory of and inconsistent with the allegation of fraud, such allegations are properly stricken out.

SCHOOLS—*Liability of school district for loan on bonds.*—Although the trustees of a school district exceed their authority in contracting for a loan on bonds of the district, yet, if the money is advanced under the contract in good faith and is used for school purposes, the district is under a liability to refund the money so advanced and expended.

SAME—*Constitutional law—Retrospective legislation.*—Section 3, Article XIII, of the State Constitution, providing that all moneys borrowed by any municipality, or other subdivision of the state, "shall be used only for the purpose specified in the law authorizing the loan," is not violated by the Act of February 18, 1895, which provides that money loaned or advanced for school purposes on bonds of the district which are afterwards declared to be void by the supreme court of the state, may be repaid from the proceeds of the sale of subsequent bonds issued for school purposes. Nor is such

act retrospective in its operation, and therefore within the inhibition of section 13, article XV, of the constitution, providing that the legislature shall pass no law retrospective in its operation or which imposes upon the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.

Appeal from Eighth Judicial District, Cascade County.

APPLICATION for writ of mandamus. The writ is granted by BENTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is a proceeding for a writ of *mandamus*. In its affidavit the relator alleges that it is the owner of the following warrant:

"No. 2,604. Great Falls, Mont., April 6th, 1895. The treasurer of Cascade county will pay fifteen thousand eight hundred thirty-three and 56-100 dollars to Northwestern National Bank, or order, for moneys advanced on H. S. Bldg., out of any moneys in the treasury to the credit of school district No. 1 building fund. \$15,833.56. O. H. Holmes, Chairman of Trustees. A. E. Canfield, Clerk of Board of Trustees." It is alleged that it presented said warrant to the defendant, and demanded payment thereof; that said demand was refused; that, at the time of the presentation and demand of the payment of said warrant, the defendant had in his custody, as the treasurer of said county, ample funds available for the payment thereof.

The lower court issued an alternative writ of *mandamus* on the filing of the affidavit, requiring defendant to pay said warrant, or show cause for not doing so.

In his answer and return to said writ, defendant admits that he is the treasurer of said county; that the warrant was presented, and demand made for the payment thereof; and that he refused to pay the same. He also admits that he had sufficient funds in his hands belonging to said district to pay the same. He denies, however, that the warrant was drawn by the board of trustees of said school district. The answer then sets up at great length the history of the transactions between

the trustees of said school district and the relator herein in reference to the issuing of bonds by the trustees of said district for the purpose of building school houses, and purchasing land therefor in said district, and the advancement of money by relator to said trustees for said purpose on said bonds, as well as the conditional sale of said bonds to the relator by said trustees.

From this history it appears that in the year 1894 an election was had by the electors in said district upon the proposition to issue bonds in the sum of \$80,000, for the purposes aforesaid. Bonds were issued in said amount, by said district, for said purposes. They were advertised for sale. Bids were made. These bids were all rejected. Thereafter the bonds were conditionally sold to the relator at private sale. The condition was that the relator was to take the bonds, provided the supreme court decided the bonds to be valid. At that time there was a doubt in the minds of the trustees and the relator as to the validity of these bonds. To determine this question, a suit was commenced by James T. Stanford, vice president of the relator, against the trustees of said district. See *State v. School Dist No. 1*, 15 Mont. 133, for the facts and results of said suit in this court. After said conditional sale of said bonds, and before the question of their validity had been determined by the courts, the relator and trustees entered into a contract whereby relator agreed to advance a sum of money to the trustees, not to exceed \$20,000, for the purpose of building a school house in said district. While these transactions between relator and said trustees were taking place, the trustees had contracted with the McKay Brothers for the erection of a high school building in said district, at a cost of more than \$50,000. Pursuant to the contract to advance money to said trustees for said purposes, the relator paid out the sum mentioned in the warrant in controversy on divers and sundry warrants drawn by the trustees for labor, material, etc., employed and used in the partial construction of said high school building. It is alleged that there were no funds in the treasury with which these several warrants could be paid, but that

they were assigned to the relator, and thereupon the relator furnished the funds to the treasurer to meet and pay them, in accordance with the contract aforesaid with relator to advance money to the trustees for such purpose.

It is alleged in the answer that all these transactions between the relator and the trustees, as well as the building contract with the McKay Brothers, were without authority of law and void, for the reason that there were no funds in the treasury at the time to meet and pay for the same. It is also alleged that the conditional private sale of the bonds to relator, and all the transactions set out in the answer, were void, and that relator had full knowledge thereof. It is alleged in the answer that on the 27th day of December, 1894, and after the date of the transactions aforesaid, an election was held in said school district upon the proposition to issue the bonds of said district in the amount of \$90,000, for the purpose of building one or more school houses, etc.; that a majority of the qualified electors of said district voted in favor of issuing said bonds; that said bonds have been issued and sold by the trustees, and the money for the sale thereof has been paid to the defendant, but the defendant claims that this money is not available for the payment of the warrant in controversy.

The court below, on motion of relator, struck out all of defendant's answer, except the denial that the warrant in suit was issued by the board of trustees of said district.

After hearing proof as to the issuance of the warrant, the court entered judgment for the relator that a peremptory writ of *mandamus* issue, and for costs.

From this judgment the defendant appeals.

Arthur J. Shores, for Appellant.

1. The warrant was not in the form prescribed by statute. (Sections 763, 772, 1867, 1869, fifth division, Compiled Statutes; *Connor v. Morris*, 23 Cal. 447; 2 Cook on Stock and Stockholders, 3d Ed. § 716; *Chapman v. Limerick*, 56 Me. 390; *Saline Co. v. Wilson*, 61 Mo. 237.)

2. Treasurer may rightfully refuse to pay a warrant not properly drawn, or drawn for an unauthorized purpose. Even if it were the legal duty of the treasurer to pay as contended by the respondent, it would not necessarily follow that upon his refusal to pay the Court would by *mandamus* compel payment. While it is true that the function of the writ is to compel performance on the part of the officer of a duty enjoined upon him by law, still the writ will not issue unless the right of the relator to the money is clear. (*Territory ex rel Tanner v. Potts*, 3 Mont. 367; *Chumaseo v. Potts*, 2 Mont. 266; *Territory ex rel Largey v. Gilbert*, 1 Mont. 376; High on Extraordinary Legal Remedies, 2 Ed. §§ 9, 26; *Slavin v. Wendell*, 7 N. Y. 171; *Keller v. Hyde*, 20 Cal. 594; *Perry v. Ames*, 26 Cal. 372; *Ray v. Wilson*, (Fla.) 14 L. R. A. 778.)

3. The transactions upon which the warrant issued did not create any debt or obligation on the part of the district. The board of trustees were not authorized to borrow money of the relator for the purpose of building a school house, and could not by such borrowing create an indebtedness upon the part of the district. (1 Dillon on Municipal Corporations, § 457; § 1885, fifth division, Compiled Statutes; *Zolman v. San Francisco*, 20 Cal. 102; *City of Shaska v. Hedmon*, 55 N. W. 737; *Kramrath v. City of Albany*, 28 N. E. 400; *McDonald v. Mayor*, 68 N. Y. 23; *Dickinson v. City of Poughkeepsie*, 75 N. Y. 74.) For full discussion of the principle see the following cases holding that where there is a lack of power upon the part of the corporation itself to enter into a contract, or where a manner of contracting directed by statute has not been pursued, there can be no recovery either upon the contract or upon *quantum meruit*. (*Goose River Bank v. Willow Lake School Tp.* (N. D.) 26 Am. St. Rep. 605; *Daly v. San Francisco*, 13 Pac. 321; *Parr v. Village of Greenbush*, 72 N. Y. 470; *Smith v. Newburg*, 77 N. Y. 130; *Liddy v. Long Island City*, 10 N. E. 156; *Brown v. School District*, 10 Atlantic 119; *People v. Gleason*, 25 N. E. 4; *Andrews & Co. v. Curtis*, 22 S. W. 72; *Capital Bank of St. Paul v. School*

Dist., 48 N. W. 363; and many other cases hereinbelow cited on other points.) The received doctrine everywhere is that all persons dealing with the officers of public corporations must take notice of the extent of their powers. (*Thomas v. Richmond*, 12 Wall 349; *Liddy v. L. I. City*, 10 N. E. 156; *Durango v. Pennington*, 7 Pac. 14; *Newberry v. Fox*, 33 N. W. 333; *F. & M. Bank v. School District*, 42 N. W. 767; *Daly v. San Francisco*, 13 Pac. 321; *Smith v. Newberry*, 77 N. Y. 130; *City of Litchfield v. Ballou*, 5 S. C. 820; *Thomas v. Richmond*, 12 Wall 349.)

4. The act of February 18, 1895, does not cover the case of relator because the relator's claim originated in a fraudulent and willful violation of law, and because relator's case is not described by the terms of the act. Acts conferring special privileges upon or granting public property to private individuals are construed strictly against the grantees and in favor of the public. (Am. and Eng. Ency., Vol. 13 p. 497, and case cited.) In *Edmonds v. Carmichael*, 3 Littell (Ky.) 472, the court says:—Speaking of the facts recited in the preamble of a private statute.—“Such a preamble is evidence that the facts were so represented to the legislature,” and this language is quoted with approval by the same court in *May v. Frazee*, 4 Litt. (Ky.) 391. The act is unconstitutional. It is clearly within the inhibition of section 3, article XIII, and section 13 of article XV. of the Constitution. It provides that the school trustees “may” pay, etc. This language must be regarded as imperative. (*Supervisors of Rock Island County v. United States*, 4 Wall 435; *Huston v. City of New York*, 9 N. Y. 162; *Bowen v. City of Minneapolis*, 47 Minn. 115.) A school district is a “municipal subdivision” of a state. (2 Bouvier's Law Dictionary, under “Municipal” and “Municipal Corporations.”) The term is manifestly used in various places in our constitution to designate, not cities, but other public corporations created by the state for the discharge locally of certain government functions, or state duties. For example: Sec. 4, art. XII; sec. 6, art. XII; secs. 3, 4, art. XIII. (See, also: *St. Louis v. Shields*, 67 Mo. 247; *People*

v. *Salomon*, 51 Ill. 37; *Horton v. Mobile School Commissioners*, 43 Ala. 598; *School District No. 7 v. Thompson*, 5 Minn. 227; *Dowlan v. County of Sibley*, 36 Minn. 430; *Curry v. District Township of Sioux City*, 17 N. W. 190; *Hotchkiss v. Plunkett*, 22 Atlantic 536; *Board of Directors v. Peterson*, 29 Pac. Rep. 995; *Maxson v. School District*, 31 Pac. Rep. 462; *School District v. Grimes*, 34 Pac. Rep. 836; *Pacific Mfg. Co. v. School District*, 33 Pac. Rep. 68; *Wadsworth v. School District*, 35 Pac. Rep. 371; *Trustees of Graded Schools v. Broadhurst*, 13 S. E. 780.)

Lyter & Greene (B. P. Carpenter of counsel) for Respondent.

1. The warrant delivered by the board of school trustees to the Northwestern National Bank was a valid warrant "in legal form and fair on its face." It was signed by the chairman of the board, and countersigned by the clerk. The act of 1895 authorizes payment by the board as a unit, and an organized body. In such case the signature of the chairman is the signature of the board. A school district is a corporate body for the purpose of enforcing the provisions of the act of March 2d, 1883. (§ 1953, Fifth Division Compiled Statutes.)

2. The treasurer wrongfully refused to pay the warrant. The warrant being in due and proper form, it became the duty of the treasurer to pay it. He admits having the money on hand. This is not a case where any fraud or irregularity has been alleged against the board of school trustees. Section 1908, as to purposes for which school moneys may be used, is part of the "Montana School Law," and applies only to county school moneys, and not to money voted to be raised for the building of school houses. The testimony clearly shows that the amount due to the Northwestern National Bank was properly audited by the school board, and a warrant therefor directed to be drawn and issued. By the act of February 18th, 1895, the school board was constituted the auditing body, and the simple duty of the treasurer was to pay the warrant. (*McFarland v. McCowen*, 33 Pac. 113.)

3. The district court did not err in striking out part of defendant's answer. Nothing whatever is set up in the answer showing any fraud on the part either of the school board or the bank in regard to the sale of the bonds, or the advancement of money on account thereof. The payment of the money by the bank to the county treasurer to enable that officer to honor the drafts of the board, was the same in effect as a payment to the board. The school board did not act *ultra vires*, but entirely within the scope of its authority, in receiving an advancement upon the sale of the bonds. It sought to comply with the statute in every respect. If the money was advanced and received under mistake of fact or law there was a liability resting upon the district to repay it. The board did not act in violation of any statute in making the building contract, issuing its warrants or receiving the advancement of money. It is a general principle of law that the legislature may cure defects in any act or proceeding that it could have authorized, and thus validate the imperfect execution of a power. Appellants authorities are not applicable to the facts of this case. *City of Litchfield v. Ballou*, 114 U. S. 190, might apply to a case arising under § 6 of Article XIII of the constitution. *Kramrath v. City of Albany*, 127 N. E. 581, holds that if no statute forbids the corporation from contracting, there is a liability on a *quantum meruit*. Even if a contract were clearly *ultra vires* the legislature could validate it, although the corporation perhaps could not ratify it. The case here presented is not that of the bold transgression of the limits of authority, but that of a public body faithfully endeavoring, by an attempted compliance with the letter of the statute, to execute the powers conferred, but failing perfectly to execute such powers through a misinterpretation of some statutory provision. The school board did nothing except what it was authorized to do, if there had been no error in some intermediate step. Its proceedings were not *ultra vires* in the ordinary acceptation of the term, if at all. (*Miners' Ditch Co v. Zellerbach*, 37 Cal. 543.) Where no injury has resulted such action cannot be void as against public policy.

4. The act of 1895 is not in violation of section 3, Art. XIII of the state constitution, nor of section 13 of Art. XV. In the latter section the words "retrospective in its operation" cover and include all that follows in the same section. They include a retroactive law, or a law "which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already passed." But if some meaning is to be given to the last clause of said section it can only be a limitation upon the meaning of "a law retrospective in its operation," or the meaning of "retrospective" must be limited by said last clause. A retrospective law is one which imposes a new liability. The act of 1895 imposes no new liability—it effects only the remedy. The school trustees had a right to make this repayment without an enabling act. There was certainly a full consideration received by the school district, and an obligation based upon equity to repay. The constitutional provision does not prevent repayment in such a case, and the act of 1895 is not retrospective within the meaning of said section 13. (*New Orleans v. Clark*, 95 U. S. 655; *Reed v. Plattsmouth*, 107 U. S. 575; *Louisiana v. Wood*, 102 U. S. 299; *Goshorn v. Purcell*, 11 Ohio N. S. 641; *State v. Richland*, 20 Ohio N. S. 369; *Fisher's Negroes v. Dobbs*, 6 Yerg. 119.) The school district, notwithstanding the invalidity of the bonds, was and is liable in law to repay the money advanced by the bank. (*Hitchcock v. Galveston*, 96 U. S. 350; *Morville v. American Tract Society*, 123 Mass. 129–137; *Chapman v. County of Douglass*, 107 U. S. 357; *Moore v. Mayor*, 73 N. Y. 246; *Argenti v. City of San Francisco*, 16 Cal. 256; 1 Beach on Public Corporations, §§ 226–227 and twenty cases there cited.) The act of 1895 cannot be treated as a law for the benefit of anybody. It applies generally to persons and corporations. It confers no favor or especial privilege, and makes no grant. It provides simply for the promotion of justice, and applies to all who may come within the scope of its provisions. Section 13 was intended to prevent the legislature from imposing upon a municipality a burden for the enrichment or advantage of a

particular individual or corporation when no previous liability existed. It is immaterial whether or not a school district is a municipal subdivision of the state within the meaning of section 13 of Article XV, for it has already been shown that the act of 1895 is not retrospective within the meaning of said section 13 and also that it does not create a new liability. A school district, however, is not a municipal subdivision of the state within the meaning of said section 13. (*People v. Trustees*, 78 Ill. 136; *Dillon on Municipal Corporations*, (3rd Ed.) § 22; *Eaton v. Supervisors*, 44 Wis. 489; 1 *Beach on Public Corporations* §§ 5, 6, 7, 8, et seq.)

PEMBERTON, C. J.—The appellant contends that the warrant in controversy is not in legal form. This contention is based upon the fact that the warrant is signed by the chairman and clerk of the board of trustees of the school district in their official capacity, and not by all or a majority of the trustees. It is not disputed that the trustees properly audited the claim for which this warrant was issued. For the purpose of raising funds, and for the issuing and sale of bonds to raise funds for the building of school houses, etc., each school district is declared by the law of this state to be a body corporate. (Comp. St. div. 5, § 1953.) Throughout the school law the trustees are designated the "Board of School Trustees." Section 1951 provides that, when bonds are issued by a school district, "they shall bear the signature of the chairman of the board of trustees, and shall be countersigned by the clerk." From a consideration of the school law of the state, we are of opinion that the warrant is in such form as is contemplated in such cases. We are unable to see that the defendant could have been in any way liable to injury by paying the warrant on account of the form thereof.

The appellant assigns as error the order of the court striking out those parts of his answer noted in the statement. The portions of the answer stricken out set out with great particularity, and at great length, the entire history of the bonds in the sum of \$80,000, issued by the trustees of the district,

the sale thereof to relator, as noted in the statement, the contract of the relator to advance money to the trustees for the purpose of building school houses, the contract with the builders for the erection of a school house, the drawing of warrants in payment for labor and material employed and used in the construction of said school house, the payment of said warrants by the treasurer with funds advanced by relator, the doubts that existed as to the validity of the bonds, the institution and result of the suit to test the validity thereof, and the issuing of new bonds by said district in the sum of \$90,000 in lieu of those which were declared to be invalid. But in all this showing we are unable to discover any allegations of fact establishing or tending to establish bad faith or fraud on the part of the trustees and the relator in any of these transactions. There does not appear a single allegation in the answer stricken out that is inconsistent with good faith and fair dealing between the trustees and the relator.

It is true that defendant alleged in his answer, which was stricken out, on information and belief, that relator procured and induced the trustees to sell it these bonds at private sale, for the purpose of procuring them at a less price than other investors would have paid for the same if valid, for the purpose of defrauding the district. But this allegation, on information and belief, must be construed in the light of the other allegations in the pleadings. It is not denied that these bonds were first advertised for public sale; that the bids were all rejected, as shown by defendant's answer. It is further shown by the answer stricken out that relator, in its private bid for these bonds, agreed to take them at par, with an added premium of \$6 833.33. These allegations of the answer are absolutely contradictory of and inconsistent with the allegation of fraud made therein on information and belief. We see no error in the action of the court in this regard.

The appellant contends that the school district did not become indebted to or liable to repay the relator the money advanced by it to pay warrants issued for the construction of a school building in said district under the contract entered into

with relator. This contention proceeds, and is sought to be maintained, upon the theory that the trustees had no authority in law to enter into such contract with relator; that said contract is for that reason void, and, being void, the relator is not entitled to recover the amount advanced thereunder.

The doctrine here contended for by appellant is fully discussed, and a great many authorities collected, in *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. 465. In this case the court says: "From the authorities we think the following principle may be educed: Where a contract has been entered into in good faith between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party, by either rescinding the contract and placing the other party in *statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit."

In Morawetz on Private Corporations (section 689) this doctrine is thus stated: "After a contract entered into by a corporation has been performed by either of the contracting parties, the fact that the making of the contract involved an unauthorized exercise of corporate power on the part of the company will not constitute a defense to an action brought by the party having performed the contract to recover compensation for a breach of the contract by the other party." In section 721 the same author says: "The general rule is that, if an agreement is legally void and unenforcable by reason of some

statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case."

In *Pimental v. San Francisco*, 21 Cal. 352, the city had received money from the unauthorized sale of land, and refused to refund the same. In speaking of the rights of the purchaser to recover money paid for said lands at said void sales, Mr. Chief Justice Field says: "This alleged want of privity, as we understand it, amounts to this: That, inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the case go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys or her refusal to refund them after their receipt. The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. (*Argenti v. San Francisco*, 16 Cal. 282.) The legal liability springs from the moral duty to make restitution; and we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its command always is to do justice." From these authorities it seems clear that if, in making

the contract under discussion, the trustees exceeded their authority, still there was created thereby a liability to refund the money advanced by relator under and in pursuance of said contract. The most, we think, that can be said in this case, is that there was an imperfect or defective attempt to comply with the law on the part of the trustees in the issuing of the bonds of the district. They had the authority under the law to issue them for the purpose for which they were issued, but failed to give a sufficient notice of the purpose and conditions thereof in providing for the election to authorize their issuance. Nor is any bad faith or fraud alleged in the issuance of said bonds. If the bonds had been declared void, we think it could hardly be contended that the contract with relator to advance money on them as security, for the building of the school house, would have been considered void for want of authority in the trustees to make the same. And, besides, the contract, so far as relator is concerned, has been fully executed, and we think the doctrine of *ultra vires* can be invoked with less force here than in cases of executory contracts. The school district secured the benefit of relator's money, advanced in good faith; and we think it would be a most inequitable and unjust holding to say that the district assumed no liability on account thereof, and that relator is left without a remedy, under the circumstances of this case.

The appellant finally contends that the relator is not entitled to recover in the proceeding, under the provisions of an act of the legislature, entitled: "An act to authorize the board of school trustees of any school district of Montana to repay from the proceeds of the sale of bonds any money heretofore loaned or advanced to it for the erection of a school house or school houses in such school district," approved February 18, 1895. This act is as follows: "Whenever heretofore money has been loaned or advanced to the board of school trustees of any school district for the erection of a school house or school houses therein by any person or corporation, in reliance upon the proceeds of the sale of bonds for the payment of the same, the issuance of which bonds had been voted

for by a majority of the electors of such district, voting at an election held for the purpose of authorizing the issuance of the same for the erection of a school house or school houses, which said money has been used by such board of school trustees in the erection of a school house or school houses in such district, but which bonds when issued have been adjudged and held to be void or invalid by the supreme court of the state, the money so loaned or advanced may be repaid, together with interest thereon covering the period for which interest has not been paid at the rate specified in said bonds so held to be void; said payment to be made by the board of school trustees to the person or corporation who or which had loaned or advanced the same, from the proceeds of the sale of any bonds thereafter issued for the purpose of building one or more school houses in said district, or for any other school purpose."

The appellant insists that this law is in conflict with section 3, art. XIII, and section 13, art. XV of the constitution of the state. Section 3, art. XIII, is as follows: "All moneys borrowed by, or in behalf of the state, or any county, city, town, municipality, or other subdivision of the state, shall be used only for the purpose specified in the law authorizing the loan." Section 13, art. XV, is as follows: "The legislative assembly shall pass no law for the benefit of a railroad or other corporation, or any individual or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the state a new liability in respect to transactions or considerations already passed." We think that it is clearly shown that the money advanced by relator was used "for the purpose specified in the law authorizing the loan," as required by section 3, art. XIII, of the constitution. The law authorized the loan of money for the purpose of building a school house in the district. The relator advanced the money for that purpose on the bonds conditionally sold to it by the trustees, and it is not disputed that the trustees used the money for that purpose only.

The appellant contends that the law of February 18, 1895,

is retrospective, and is therefore within the inhibition of section 13, art. XV, *supra*. We think this law did not impose upon the school district "a new liability in respect to transactions or considerations already passed," such as is prohibited by this section of the constitution. We have already held that a liability existed on the part of the district to refund the money advanced by relator. This liability existed prior to the passage of the law under discussion. The law imposed no new liability or burden upon the district. The law was intended to give a remedy, if remedy were wanting before its enactment. We think the legislature had the power to enact the law, and that the law does not conflict with the constitution of the state.

In *New Orleans v. Clark*, 95 U. S. 644, a case involving the constitutionality of such legislation, the court says: "The constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law; no more than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the state, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion." See, also, *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208; *Louisiana v. Wood*, 102 U. S. 294.

We have carefully considered all the assignments of error presented in this case. We have been unable to discover any reason or law to support the contention of appellant that relator is without right or remedy in this case.

The judgment of the court is affirmed.

Affirmed.

DE WITT and HUNT, JJ.. concur.

16	294
17	394
17	501

REED ET AL., APPELLANTS v. POINDEXTER ET AL., RESPONDENTS.

16	294
d36	79

[Submitted June 5, 1895. Decided June 10, 1895.]

PLEADING—Contradictory counts—Demurrer—Replevin.—A complaint in replevin which alleges in one count that goods of which defendant obtained the delivery by false representations were transferred to certain co-defendants as an assignment for benefit of creditors and in another count that the transfer was made in payment of a debt due by defendant to one of said co-defendants, is demurrable as uncertain and ambiguous, since it cannot be determined therefrom upon which of these contradictory allegations plaintiffs rely.

SAME—Same—Ruling on demurrer.—Where a demurrer to a complaint which sets up a cause of action in two contradictory counts is sustained for uncertainty and ambiguity, the trial court is not required to determine whether either or both of the statements of plaintiffs' causes of action were correct.

Appeal from Fifth Judicial District, Beaverhead County.

ACTION of replevin. Defendants' demurrer to the complaint was sustained by SHOWERS, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiffs brought this action in replevin, seeking the return of certain personal property. They allege that they sold and delivered the property to the defendant the Poindexter Commercial Company. They allege that said defendant obtained said sale and delivery by false representations as to its solvency. The position of the plaintiffs is that by reason of said false representations the title to the property did not pass to said defendant. There is, in fact, but one cause of action, but the pleader, for some reason, has stated it in the complaint in two counts. In the first count it is alleged that the goods had been transferred by the Poindexter Commercial Company to the defendants P. H. Poindexter and W. A. Jones, and that the said transfer was made as an assignment for the benefit of the creditors of said Poindexter Company, and particularly said P. H. Poindexter. In the other count in the complaint it is alleged that said goods were transferred by said Poindexter Company to the defendants P. H. Poindexter and

W. A. Jones in payment of an antecedent debt owing by said company to said P. H. Poindexter.

To this complaint a demurrer was filed. The demurrer was upon two grounds, as follows: "(1) Because said amended complaint does not state facts sufficient to constitute a cause of action against them or either of them; (2) because the said amended complaint is uncertain and ambiguous, in this, to wit, that two causes of action are therein attempted to be stated, neither of which are sufficiently distinct and separate so as to enable the defendants to determine whether the plaintiff relies upon the one or the other for their recovery." The demurrer was sustained as to P. H. Poindexter and W. A. Jones. Judgment was thereupon entered in favor of said Poindexter and Jones for their costs. The plaintiffs appeal from the judgment.

W. S. Barbour and Robinson & Stapleton, for Appellants.

Shropshire & Burleigh and John B. Cluyberg, for Respondents.

DE WITT, J.—It does not appear from the record whether the demurrer was sustained upon the first ground or the second, or whether upon both grounds. We are of opinion that the demurrer was good upon the second ground. The complaint was certainly ambiguous.

The two causes of action to which the demurrer refers are in fact but one cause of action, differently stated, and contradictorily stated. The plaintiffs sought to follow the personal property into the hands of Poindexter and Jones, who were persons other than the original purchaser of the property. The complaint stated in one place that the property was transferred to said Poindexter and Jones as assignees for the benefit of creditors. Again, the complaint stated that the transfer was made to these persons in payment of a debt due by the Commercial Company to said Poindexter. One of these statements may be true. They are certainly not each true, for the rea-

son that they contradict each other. It is true, as defendants set up in their demurrer, that they cannot determine upon which of these contradictory allegations the plaintiffs rely. One may not set up his cause of action in terms which contradict each other and expect a defendant to answer. We think the judgment must be sustained upon the second ground of the demurrer.

We do not think that the district court was required to make any further investigation of the complaint. We are of opinion that that court was not called upon to go further, and determine whether either or both of the statements of the plaintiffs' cause of action were sufficient. In order to obtain a ruling from the district court as to whether plaintiffs had a cause of action, they should have first set up that cause of action in consistent language, and then the court could have determined whether the facts set up were sufficient. We are also of opinion that we are not required to determine whether either of the statements of the cause of action was sufficient. If either we or the district court were required to make such investigation, it would be in effect saying to a plaintiff's counsel, "You may set up your alleged cause of action in as many contradictory expressions as you please, and get a ruling of the court upon which one is good and then rely upon the same in your proof." This we decline to do. For all that appears in the record, this is what the district court declined to do; for it appears simply that that court sustained the demurrer without stating upon which ground.

The judgment is affirmed, and the case is remanded to the district court, with permission, however, to the plaintiffs to amend their complaint.

Affirmed.

PEMBERTON, C. J., and HUNT, J, concur.

THOMAS ET AL., RESPONDENTS, v. FRANK, APPELLANT.

[Submitted June 6, 1895. Decided June 10, 1895.]

CONVEYANCE—Purchase price—Consideration in deed.—Suit was brought against the occupants of certain land by persons claiming the ground under a quartz location. To resist this litigation the plaintiffs in the case at bar located the land for themselves and the other defendants in said suit, and agreed that in case said defendants were successful in defending the suit, said plaintiffs would convey to each of them who contributed his *pro rata* share towards the defense such portion of the land as the amount of money contributed should bear to the whole amount expended in defending the suit. The defense prevailed, but several of the owners of lots involved in the suit failed to pay their proportion of the expenses, and the said plaintiffs were obliged to pay, in excess of the amounts actually collected by the *pro rata* assessments, a deficiency of about five hundred dollars. One of the lot owners who had defaulted in his payment, and whose assessment amounted to about forty-one dollars, sold and conveyed his interest to the defendant in the case at bar, who, after ascertaining the right, title and interest of said plaintiffs in the lot, had a deed prepared by a notary, conveying the interest of these plaintiffs to himself, but no consideration was expressed in the deed. The defendant then directed the notary to take the deed to the plaintiffs, who fixed the consideration at two hundred dollars, and asked the notary to see the defendant and ascertain if that was satisfactory. The notary did so, and, after consulting the defendant, informed the plaintiffs that the defendant wanted the deed, and did not care what consideration was inserted. The plaintiffs thereupon executed the deed with a consideration of two hundred dollars written therein, and the deed was delivered to the defendant. *Held*, that the plaintiffs had an equitable claim to be reimbursed for their expenditures, and, it being clearly with a view to secure such reimbursement that they fixed upon the consideration so named in the deed, to which the defendant must be deemed to have assented, they were entitled to recover that amount.

Appeal from Second Judicial District, Silver Bow County.

ACTION to recover the consideration named in a deed. Judgment was rendered for the plaintiffs below by McHATTON, J. Modified and affirmed.

Statement of the case prepared by the justice delivering the opinion.

Suit by plaintiffs against defendant, in the justice's court, to recover the sum of \$200, alleged to be due for the price of the surface ground of certain lots conveyed by plaintiffs to defendant, and which, it is alleged, was the price agreed upon for such conveyance.

The defendant denied any promise to pay plaintiffs \$200, or any other sum, for the property, but alleged the facts to be

that plaintiffs and one Archer agreed with all the occupants of the Destroying Angel lode claim, in Butte, whereby plaintiffs and Archer were to convey to all the occupants of said lode claim the several lots owned by such occupants on the said claim, and a *pro rata* interest in the surface ground of said claim, if said occupants would contribute to the defense of a lawsuit then pending in the courts of Silver Bow county, wherein Lee Mantle and others were plaintiffs, and plaintiffs herein and others were defendants; that defendant contributed and paid to plaintiffs his proportion of such expense, to wit, \$41.25, which amount represented defendant's *pro rata* interest in said litigation, and plaintiffs accepted the same as full consideration for the conveyance to defendant of the lots described in the complaint, and in consideration thereof, and of the release of his *pro rata* interest in the additional surface ground of the Destroying Angel lode claim by defendant, plaintiffs executed to defendant the deed mentioned in the complaint, which said amount defendant has fully paid, and has also released to plaintiffs his claim to the *pro rata* surface ground of said lode claim; that the consideration of \$200 recited in the deed was not the real consideration, but that the same was as heretofore stated.

The case was tried to a jury. Verdict for plaintiffs for \$200. Defendant appealed to the district court. The case was there tried to a jury. Again the plaintiffs secured a verdict for \$200. Motion for new trial was made and overruled. Defendant appeals.

Forbis & Forbis, for Appellant.

Thompson Campbell, for Respondents.

HUNT, J.—The only error relied upon by the appellant is the insufficiency of the evidence to sustain the verdict of the jury.

About 1883, Lee Mantle and others sued the occupants of certain portions of the townsite of Butte, claiming the ground

under a quartz location called the "Diadem Lode." To resist this litigation the occupants organized as the "Destroying Angel Pool," and the ground involved in the litigation was located by these plaintiffs and Archer as the "Destroying Angel Lode Claim." This location was made for the benefit of the occupants on the ground under the townsite patent, as appears from the agreement offered in evidence on the trial. Under the terms of this agreement these plaintiffs and Archer, on January 19, 1884, agreed with a large number of persons that in view of the litigation heretofore referred to, and the contribution by them to carry the same on, to defend the same for the benefit of the parties to the agreement; and in consideration of the premises, and of the money so paid and furnished to said first parties (plaintiffs herein), they also agreed with all defendants in said suit, "who shall come in and pay and contribute money to defend said suit, that in case said defendants in said suit shall be successful in the defense of said suit and shall be the prevailing parties therein, and shall defeat said plaintiffs, Lee Mantle *et al.*, in said suit, the said first parties will then deed and convey, by good and sufficient conveyance, such part or portion of the surface ground of said Destroying Angel lode as each of the said second parties, and other defendants who shall pay as aforesaid, claim and are entitled to. Said first parties further agree with said second parties that in case any part of the surface ground shall be and remain after making said conveyances aforesaid, and after taking out such part or portion thereof, as said first parties claim as town lots, that they will convey to said second parties such part or portion of said remaining portions of said surface ground of said Destroying Angel lode claim as the amount of money paid and contributed by them shall bear to the whole amount expended in defending said suit; that is to say, that after said first and second parties each get the amount of surface ground claimed by each of them as town lots, that any and all remaining parts or portions of said Destroying Angel lode claim surface ground shall be shared, and belong to said first and second parties, and others who may, as defendants, contribute to the defense

of said suit as aforesaid, *pro rata*, according to the amount of money each may have paid towards said defense."

It further appears that one Van Gundy, of Deer Lodge, prior to 1886, had been the owner of the lot out of which the present suit grew. Van Gundy neglected to pay his *pro rata* of the expense of the defense of the suit while the same was pending. It does not appear that Van Gundy was directly a member of the pool, but that his property was affected by the litigation is admitted. Other claimants failed to pay, and plaintiffs were obliged to pay sums largely in excess of the amounts actually collected by the *pro rata* assessments upon lot owners, made under the terms of the agreement hereinbefore referred to. These excesses amounted to between \$400 and \$500. The defendant Frank bought the Van Gundy lot about this time, and had some conversation with plaintiffs in regard to their right, title, and interest to the same by virtue of the Destroying Angel claim. There was, however, no definite agreement as to the price to be paid to plaintiffs for their interest. Defendant had a deed prepared, conveying the interest of these plaintiffs to himself. No consideration was expressed in the deed when it was prepared. A notary was then directed by defendant to take the deed to plaintiffs. Plaintiffs told the notary that the consideration to be put in was \$200, and asked him to see defendant, and ascertain if that was satisfactory. The notary did consult defendant, and returned to plaintiffs, telling them, substantially, that defendant wanted the deed, and did not care what the consideration inserted was. Plaintiffs thereupon executed the deed, with a consideration of \$200 written therein, and the same was delivered to defendant by the notary.

Defendant says he did not authorize the notary to make any agreement. The notary did not make any agreement, but did convey to defendant the fact that plaintiffs wanted a consideration of \$200 inserted in the deed. After this message was taken by the notary, and delivered, the notary at once returned to the plaintiffs, and took their acknowledgment to the instrument. We think that the jury were justified in believing,

from all these facts, that the defendant assented to the consideration of \$200 demanded by the plaintiffs, and authorized the notary to secure their signatures, after he was told of the consideration. Any other inference, too, would be to cast a suspicion of willful deception and wrong upon the conduct of the notary himself, and would imply that he deliberately misled the plaintiffs into a false belief concerning the consideration named in the deed. Such an inference is not to be presumed, and is not warranted by the evidence.

Defendant says that he did not mean to pay plaintiffs anything more than he had paid on the amount assessed to Van Gundy, which was \$41.25. Doubtless, he honestly believed he might secure the interest of Van Gundy by the payment of that sum. But when it is remembered that Van Gundy had not paid his assessment when he ought to have paid it, and that these plaintiffs had to pay out some \$400 to \$500 more than the assessments for the litigation amounted to, it is but equitable and just that they should be reimbursed by those who were the beneficiaries of their expenditures, and it was clearly with a view to secure such reimbursement that they fixed upon the consideration of \$200 before they were willing to execute and deliver the deed to defendant.

The appellants suggest that plaintiff had no right to demand this sum, but this suggestion is disposed of by answering that they did have an equitable claim to be reimbursed, and if the defendant, as the purchaser of an original owner, who had defaulted in his payment, desired to come in after such default, it does not seem at all inequitable that he should pay, as a consideration for the privilege, a share of the deficiency incurred by plaintiffs, who had expended time and money in the litigation affecting the property.

The facts present a case where the jury were warranted in finding as they did, and when we consider that two juries and a judge have reviewed the testimony, and reached the same conclusion, we do not feel at liberty to disturb it. We are of opinion, however, that, inasmuch as the plaintiffs evidently disregarded the check of defendant for the amount of the Van

Gundy assessment in the negotiations, the defendant's check for that sum, delivered to Beck, treasurer, should be returned to defendant, or, if the same has been presented and paid, the amount thereof, with legal interest thereon since date of actual payment, should be credited to defendant on the amount of this judgment.

Let the judgment therefore be modified to conform to these views, and, as so modified, let it be affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

HARRIS ET AL., RESPONDENTS, v. RAMSEY, APPELLANT.

[Submitted June 7, 1895. Decided June 10, 1895.]

APPEAL—Change of venue—Failure to file briefs.—An order granting a motion for a change of venue will be affirmed on appeal where no error in the exercise of discretion appears, and no brief is filed or argument made by the appellant. (*City of Helena v. Brule*, 15 Mont. 429; *State v. Dakin*, 15 Mont. 556, cited.)

Appeal from Fourth Judicial District, Missoula County.

PLAINTIFFS' motion for a change of venue was granted by WOODY, J. Affirmed.

Marshall & Corbett, for Appellant.

Bickford, Stiff & Hershey, for Respondents.

DE WITT, J.—This is an appeal from an order granting a motion for a change of venue, made upon the grounds of the convenience of the witnesses and the ends of justice. (Code of Civil Procedure, § 62.) Upon the hearing affidavits were used in support of and in opposition to the motion. We find no error in the exercise of discretion of the lower court.

No brief was filed by appellant, and no argument made by him in this court. When appellants take such course, we shall

not make an elaborate search to find error. (*City of Helena v. Brule*, 15 Mont. 429, citing *Territory v. Roberts*, 9 Mont. 12; *Territory v. Mooney*, 8 Mont. 151; *Territory v. Stanton*, 8 Mont. 157; *State v. Dakin*, 15 Mont. 556.)

The order appealed from is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

KENDALL, APPELLANT, v. O'NEAL, RESPONDENT.

16 303
37 543

[Submitted June 10, 1895. Decided June 17, 1895.]

ORDER STAYING EXECUTION—Correction of record.—Where an order is made staying execution for thirty days in which to prepare and file statement on motion for a new trial, but through an omission of the clerk the minutes merely show an order staying execution for thirty days, the record may be corrected to conform it to the truth after the period of the stay has expired. (*Territory v. Clayton*, 8 Mont. 1, cited.)

FRAUD—Conveyance by husband to wife—Conversion—New trial.—In conversion by a wife to recover the value of property claimed by her, but seized under an attachment against her husband, the granting of a new trial, after a verdict for plaintiff, was not an abuse of discretion, where it appeared in evidence that the husband after marriage had turned over to his wife his money and property, she having no property at the time, and thereafter managed it as her agent; and that upon examination as to the good faith of the transaction he had denied that the transfer was made to place the property beyond the reach of creditors, but qualified it by saying, that when a certain person "was going to sell him out and give him no show, a man would be a fool for not protecting himself."

Appeal from Tenth Judicial District, Choteau County.

CONVERSION. Defendant's motion for a new trial was granted by DuBOSE, J. Affirmed.

Howard S. Green and Ewing & Green, for Appellant.

Walsh & Newman and Donnelly & Knox, for Respondent.

PEMBERTON, C. J.—This is an action to recover damages of the defendant for the value of certain hay, which it is alleged he wrongfully took from plaintiff, and converted to his own use. Plaintiff was the wife of Charles O. Kendall at the time

of commencing this suit. The defendant was the sheriff of Choteau county, and took the hay, as such sheriff, under an attachment issued in a suit against Charles O. Kendall to recover a debt due by said Charles O. Kendall. The plaintiff claimed the hay as her separate property. The case was tried to a jury, who returned a verdict for the plaintiff. Defendant moved the court for a new trial, which was granted. From the order of the court granting a new trial this appeal is prosecuted.

The appellant contends that the statement on motion for new trial was not served and filed within the time required by law. The verdict was rendered on the 16th day of May, 1893. Notice of motion for new trial was served on the 25th day of May. On the 17th day of May the court, on motion of defendant's counsel, granted a stay of execution for 30 days. This order did not state the object or purpose thereof. On the 2d day of October thereafter the court amended this order on the minytes so as to read as follows: "In this cause, on motion of defendant's counsel, the court grants a stay of execution for a period of thirty days in which to prepare and file statement on motion for a new trial herein." And on the same day the court granted a new trial. The statement on motion for a new trial was served on the 1st day of July, 1893. The appellant contends that the court had no jurisdiction to grant the second extension. The order of October 2d simply corrected the order of May 17th so as to show what the court meant to do, and did in fact do, by granting the first order. Affidavits were filed to show what were the terms and object of this order, and to show that the clerk omitted to state in the order that the stay of execution was granted for 30 days, to enable defendant to prepare statement on motion for new trial. We think the court had full power to make the record state and conform to the truth, and to correct an error or omission of the clerk, when the mistake clearly appeared. This is evidently what the court did by its order of October 2. See *Territory v. Clayton*, 8 Mont. 1. The law gave the defendant 10 days after the service of notice of intention to move for a

new trial to prepare and serve statement. This 10 days, and the 30-days extension which the court may grant without the consent of the adverse party, extended the time for filing statement on motion for new trial beyond the 1st day of July, the date on which it was served and filed. We think the statement was served and filed in time.

The appellant contends also that the court abused its discretion by granting a new trial in this case. It will be observed that the plaintiff in this case is a married woman, and claims the hay taken by the sheriff for the debt of her husband as her separate property. It was shown by the evidence in this case that when plaintiff and her husband were married she had practically no money or property of her own; that her husband had considerable property; that after the marriage the money and property were turned over to the wife by transactions between themselves; that the hay in controversy was cut and made by the use of this property, consisting of teams, machinery, etc., once belonging to the husband; that the husband assisted in the cutting and saving of the hay, for wages, it is said, paid by the wife; that the husband had the control and management of the business as the agent of the wife, as is claimed. These things appear in the evidence of plaintiff offered to show her separate ownership of the property.

Under the law it is the duty of the courts to scrutinize with great care transactions of this kind between husband and wife, and only those contracts that are free from fraud, and are absolutely *bona fide*, should be permitted to stand.

In *Lambrecht v. Patten*, 15 Mont. 260, this court, in speaking of the relation of husband and wife, said: "That relation is often a convenient means for the perpetration of a fraud, and, when claims of such indebtedness are made between husband and wife, they must be subjected to the most searching examination, if not, indeed, suspicion." See, also, *Chapman v. Summerfield*, 36 Kan. 610, 14 Pac. 235.

We do not think the evidence in this case is free from doubt or suspicion. For instance, on cross-examination the following question was put to C. O. Kendall, the husband: "Q.

Now, Mr. Kendall, is it not a fact that all this property that we have been talking about, including stock and house and lot and all, was transferred by you to your wife for the purpose of getting it out of your name, and out of the reach of your creditors?" He answered this question as follows: "To answer your question directly, I say 'No;' but I will qualify it in this way: that when a man like John Powers tells me that he is going to sell me out, and give me no show, a man is a damn fool for not protecting himself."

We think this testimony was sufficient to cast a suspicion upon the *bona fides* of the whole transaction and dealing between plaintiff and her husband, and to cause the trial court to question whether the jury had rightly scrutinized and considered the evidence in relation to the dealings between them.

We are unable to discover that in granting a new trial the court abused that sound judicial discretion which governs in such proceedings. The order appealed from is affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

BRUNELL, APPELLANT, v. LOGAN ET AL., RESPONDENT.

16	307
28	181

[Submitted June 10, 1895. Decided June 17, 1895.]

APPEAL—Record—Dismissal.—Appeals, both from a judgment and from a special order made thereafter, will be dismissed without prejudice where there is no judgment in the record and it does not appear that there was a judgment entered which could be supplied under suggestion of diminution of the record.

Appeal from Fourth Judicial District, Missoula County.

On motion to dismiss appeal. Motion granted.

Bickford, Stiff & Hershey, and Webster & Wood, for the motion.

George B. Wilds, Contra.

PER CURIAM.—A motion is made in this case to dismiss the appeal on the ground that there is no judgment in the record. The record shows that the appeal is prosecuted from the judgment, and also from a special order made after final judgment.

An examination of the record discloses the fact that there is no judgment therein contained, and it does not appear that there was in fact a judgment entered which could be supplied under suggestion of diminution of the record. The appeal from the judgment is therefore dismissed, but without prejudice, however, to the taking of another appeal, if the time has not expired for so doing. It consequently follows that the appeal from the special order made after the final judgment must also be dismissed. This order is also made without prejudice to the taking of a second appeal, if the same may at this time be done.

Dismissed.

STATE EX REL. VOCOITCH, RESONDENT, v. VOTAW,
APPELLANT.

[Submitted June 10, 1895. Decided June 17, 1895.]

JUSTICE OF THE PEACE—*New trial—Certiorari.*—An order made by a justice of the peace granting a new trial upon a motion therefor made more than ten days after the entry of judgment, although the notice of such motion was given within the statutory period, is an excess of jurisdiction and will be annulled by *certiorari*. (*Wallace v. Lewis*, 9 Mont. 399; *State v. Case*, 14 Mont. 520, cited.)

Appeal from First Judicial District, Lewis and Clarke County.

CERTIORARI to review order of justice of the peace in granting new trial. Judgment was rendered for the relator below by BUCK, J. Affirmed.

C. W. Fleischer, for Appellant.

Henry C. Smith, for Respondent.

PER CURIAM.—*Certiorari.* On February 24, 1894, before A. C. Votaw, a justice of the peace, in an action of claim and delivery, wherein one O. Hermann was plaintiff, and relator and one Suttey were defendants, judgment was rendered in favor of the defendants and against plaintiff. February 26th notice of motion for a new trial was served. On March 8th plaintiff filed statement of grounds and affidavit for setting aside the judgment. Thereafter, defendants moved to strike out plaintiff's statement on motion for new trial, on the ground that said statement was not filed within the statutory time. On March 16th, thereafter, the justice issued an order vacating and setting aside said judgment, and granting a new trial in said action, against defendants' objection.

The district court held that the justice exceeded his jurisdiction in setting aside the judgment theretofore rendered. Section 820 of the Code of Civil Procedure provides that in cer-

tain cases a new trial may be granted by a justice of the peace, on motion, within 10 days after the entry of judgment, etc.

It is our opinion that, unless the motion is made within the 10 days after the entry of judgment, the justice has no jurisdiction to act upon it. A notice of motion is not a motion. (*Wallace v. Lewis*, 9 Mont. 399.) More than 10 days having elapsed between the entry of the judgment and the filing of the motion, the district court correctly vacated the order of the justice of the peace setting aside the verdict and judgment in the original case tried before the justice. (*State ex rel. Johnson v. Case*, 14 Mont. 520.) Judgment affirmed.

Affirmed.

All concur.

WATKINS ET AL., APPELLANTS, v. MORRIS ET AL., RESPONDENTS.

[Submitted June 10, 1895. Decided June 17, 1895.]

SALE—Delivery—Evidence to support findings.—In an action for damages for a breach of contract for the purchase of oats, where a prompt delivery was required, a finding that the oats were not delivered within a reasonable time is supported by evidence that two car loads were shipped to defendants by a circuitous route and that the other car load, while shipped by a direct route, was consigned to other parties, defendants having no knowledge of its arrival until after they were obliged to buy elsewhere.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for damages for breach of contract. Judgment was rendered for the defendants below by ARMSTRONG, J. Affirmed.

Henry C. Smith and F. N. & S. H. McIntire, for Appellants.

Plaintiffs were entitled to deliver within a reasonable time under the circumstances. (Newmark on Sales, § 332; 2 Benja-

min on Sales, § 1027; Tiedeman on Sales, § 100; 5 Wait's A. and D., § 24, p. 568.) Tender can be made by bill of lading. (5 Wait's A. and D., §§ 27, 30, 33, p. 572; 2 Schouller Per. Prop., 409, 417, 418, 419; Abbott's Trial Ev. 816; 1 Estee's Pldg. § 1388; Newmark on Sales, § 256; 2 Benjamin on Sales, §§ 897, 1018, 1044, 1047.)

Walsh & Newman, for Respondents.

Where goods are ordered by mail or telegraph to be shipped to the seller and the seller accepts the proposition contained in the order, it is his duty to consign the goods to the buyer. If he pursues any other course, his is the fault and his must be the loss. (*Sohn v. Jervis*, I. N. E. 73; 101 Ind. 578.) Delivery to the carrier, taking bill of lading in any name other than that of the buyer is not a delivery to the purchaser. (*Willman Mercantile Co. v. Lussy*, 39 Pac. 738 (Mont.) *Erwin v. Harris*, 87 Ga., 333; 13 S. E. 513.) The plaintiffs must show that the goods were delivered by them to the defendants in such manner that the defendants could lawfully demand them of the railroad company at the designated place of delivery. (*Doyle v. Roth Mfg. Co.*, 76 Wis. 48; 44 N. W. 1100.) The goods must be tendered and delivered at the time and place designated. A tender at any other time or place will not suffice. (*Hopke v. Schmalholz*, 7 N. Y. S. 67; *Erwin v. Harris*, 87 Ga. 333; *Seeligson v. Philbrick*, 30 Fed. 600.) The goods must be shipped at the time, from the place, and over the route designated by the parties. A shipment at any other time, or from any other place, or over a route not designated nor contemplated by the parties, is not a compliance with the contract. (*Filley v. Pope*, 115 U. S. 213; *Norington v. Wright*, 115 U. S. 188; *Robinson v. Brook* 40 Fed. 525.) The goods must be delivered at the time designated in the contract, and if the time is not designated they must be delivered promptly or within a reasonable time, taking into consideration the location of the parties, the means of communication between them, their intention at the time

the contract was entered into, and all the surrounding facts and circumstances. (Newmark on Sales, §§ 231, 232; Corbin Benjamin on Sales, § 1023; *Norrington v. Wright*, 115 U. S. 188. See *Donnell v. Humphreys*, 1 Mont. 526; *Taylor v. Holter*, 1 Mont. 694.) The buyer must have an opportunity to inspect the goods before acceptance, to ascertain whether or not they are of the kind and quality purchased by him. If an opportunity to inspect is not given, there is not a valid offer of delivery. He is not obliged to pay for the goods or accept the draft until he has had an opportunity to inspect them. (Corbin's Benjamin on Sales, § 1042; Newmark on Sales, § 252-260; Tiedeman on Sales, § 114; *Erwin v. Harris*, 87 Ga. 333; 13 S. E. 513.) A tender of bills of lading or warehouse receipts when objected to by the purchaser is not a good tender. (*McPherson v. Gale*, 40 Ill. 368.)

PER CURIAM.—This action is brought by plaintiffs to recover damages for the refusal of defendants to accept and pay for certain quantities of oats. They allege a contract for the sale and delivery of the oats, and that, by reason of the defendants' failure to receive and pay for the same, they were obliged to sell said oats for the best price they could get. They sue for the difference between the contract price and the price for which they were obliged, as they allege, to sell. The contract for sale was made by telegraph. It is important to note that the whole telegraphic correspondence is couched in language indicating haste and promptness. Such terms are used as "if accepted at once," "immediate acceptance," "at once," "we will make prompt shipment," and "answer quick."

The defense set up by defendants was that the plaintiffs did not deliver or offer to deliver the oats within a reasonable time, and that defendants, by reason of such delay, were obliged to supply themselves with oats from other sources. There were three car loads of oats altogether. Two car loads were sent from a point near Spokane, Washington, to Helena, by way of Huntington and Pocatello, Idaho, and Silver Bow Junction, Montana; the other car load, while sent by the

Northern Pacific, the more direct route, was consigned to persons other than the defendants, and defendants had no knowledge of its arrival until they had been obliged, as they testified, to rescind the order, and buy oats elsewhere.

The court found that the plaintiffs did not deliver, or offer to deliver, the oats to the defendants within a reasonable time. Judgment was rendered for defendants. We have reviewed the testimony, and are of opinion that the evidence was sufficient to sustain the findings and the judgment of the court. The judgment, and the order denying plaintiffs' motion for new trial, are therefore affirmed.

Affirmed.

COQUARD, RESPONDENT, v. WEINSTEIN, ADMINISTRATRIX, APPELLANT.

[Submitted June 11, 1895. Decided June 17, 1895.]

ACTION FOR MONEY PAID—Counterclaim—Burden of proof.—Where, in an action to recover money advanced and due on stock purchased for the defendant, the defendant, for an answer, sets up a counterclaim, alleging that the plaintiff should have sold the stock at a certain price, and neglected to do so, which allegation the plaintiff denies, these pleadings raise a material issue, upon which the defendant assumes the burden of proof.

PRINCIPAL AND AGENT—Ambiguous telegraphic instructions.—Where a principal gives his agent telegraphic instructions, fairly susceptible of two constructions, and the agent honestly acts on that construction not intended by the principal, and repeatedly advises the principal of his acts, and the principal well knows of such acts, and of the agent's construction of the telegraphic instructions, yet does not advise his agent of his error. In such case, if loss thereby occurs to the principal he must be held to have accepted the agent's construction, and he cannot afterwards sue the agent for such loss.

SAME—Same.—In the case at bar the defendant, in October, telegraphed to the plaintiff as follows: "Sell, for my account, five hundred shares Elizabeth, at market price. Wire the price sold." Next day the plaintiff wrote defendant that the stock was extremely dull and impossible to sell at any reasonable figure, and that he would continue the order until countermanded, and he kept the defendant continually advised of the condition of the stock market and of the decline of the stock in price till the close of the year, but received no further instructions from the latter. The defendant contended that his telegram was a continuing order to sell at the highest price when the sale was made, while the plaintiff thought that the order was to sell only for the price paid at the date of the receipt of the telegram. Held, that even if the plaintiff acted upon an erroneous construction of the telegram, the defendant, by his conduct discharged the plaintiff from all liability for such misconstruction.

Appeal from Third Judicial District, 'Deer Lodge County.

ACTION for money paid. The cause was tried before WOODY, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff and respondent, a broker at St. Louis, Mo., on or about the 22d of September, 1891, purchased for the defendant 500 shares of the Elizabeth Mining Company stock, for which he advanced \$962.50. He sues to recover the money due him for said stock, alleging that no part thereof has been paid, except \$395, the proceeds of the sale of 200 shares of the stock sold by plaintiff for defendant, at defendant's request, leaving a balance due of \$567.50. Plaintiff also sues to recover \$3 for protest fees on a certain draft upon defendant for the aforesaid amount of \$567.50.

The defendant, for an answer, set up a counterclaim, alleging that after the purchase of the 500 Elizabeth shares, the defendant ordered plaintiff to sell said stock at the highest market rate said stock was selling in St. Louis; that the highest market rate in St. Louis at the time the order was made was \$1.90 per share; that plaintiff sold 200 shares of said stock at \$2 per share, realizing thereon the sum of \$400, and failed and refused to sell the additional 300 shares at said market price; that by reason of such neglect and failure to sell said 300 shares, defendant was damaged in the sum of \$600. Defendant denied that plaintiff paid the \$3 for protest fees, as set forth in the complaint.

The replication admits that defendant ordered plaintiff to sell the said stock at the highest market rate said stock was selling for in St. Louis. Plaintiff admits that he sold 200 shares at \$2 per share, realizing \$400; denies that he refused to sell the said 300 shares at said market price of \$1.90 per share; but alleges that immediately upon the receipt of the order to sell the said 500 shares of stock, plaintiff offered the same for sale on open market, and to individual buyers, and endeavored to sell the same, and the whole thereof, at said market price of \$1.90 per share; that he was unable to find

purchasers at the market price for more than 200 shares; that the market price declined, and the said price of \$1.90 per share could not be obtained upon the sale of said stock, the next day after plaintiff received said order for sale, and that at all times thereafter the market price was under the sum of \$1.90 per share, and plaintiff has been unable to sell said stock at said price; that plaintiff has always exercised due care and diligence in attempting to sell said stock at \$1.90 per share, offering the same in open market, and to purchasers generally, but has been unable to sell said 300 shares at \$1.90 per share.

The case was tried to the court without a jury. At the conclusion of defendant's testimony, plaintiff moved for a nonsuit. This motion was granted, and judgment entered for plaintiff. Defendant appeals.

About October 2, 1891, the defendant telegraphed from Montana to plaintiff, at St. Louis, as follows: "Sell, for my account, five hundred shares Elizabeth, at market price. Wire the price sold." Upon October 3, 1891, the plaintiff wrote the defendant, telling him that his telegram was received "late yesterday after the afternoon call. The stock was extremely dull yesterday, and it was impossible to sell stock at any reasonable figure. I wired you to-day in substance that I had sold 200 shares at \$2, and trust to sell the remainder Monday. Will continue your order until countermanded. To-day being a Jewish holiday, and, in addition, a half holiday, business is remarkably dull." Again, on October 9th, plaintiff wrote defendant, acknowledging the receipt of defendant's letter of the 4th instant, and telling him that Elizabeth was very dull, and that 500 shares sold that day at \$1.90. On cross-examination defendant was asked if he had not received communications from plaintiff right along, from October 3d until the close of the year 1891, keeping him posted entirely as to the market price of the Elizabeth stock, to which the defendant replied: "Yes, I received some letters telling me about what that stock was. He [Coquard] advised me continually that the stock was declining right along after the 31st of October. I

didn't give him any other or further instructions or write to him concerning the sale of that stock. I never countermanded or considered that I owned the stock." In response to questions propounded by the court, the defendant said he "directed the plaintiff to sell the 500 shares at whatever the market price may be. He sold 200 shares at \$2 a share, and he did not sell the other 300. I lost, by reason of his not selling that there 300 shares at the market price, the difference between what he could sell the stock at then and what it is worth now. He has got these 300 shares of stock that belonged to me. I ordered him to sell the stock at whatever he might get. At the time this action was brought the stock had got down to 40c."

The plaintiff's motion for nonsuit was upon four grounds: (1) There is no proof to sustain the allegations and counterclaim. (2) There is no proof in support of the allegation that the highest market price at the time of making said order was \$1.90 per share. (3) There is no proof that plaintiff failed or refused or could have sold 300 shares, or any part thereof, at \$1.90 per share. (4) There is no proof of the value of the stock at the present time, or as to damage defendant has sustained.

F. W. Cole and H. R. Whitehill, for Appellant.

McConnell, Clayberg & Gunn, for Respondent.

HUNT, J.—A majority of the court are disposed to affirm the judgment of the district court solely upon the ground that the defendant's order for the sale of the stock was to sell for \$1.90 per share, and not to sell for any other lower price, and that for failure of any substantial proof tending to show that plaintiff, by the exercise of reasonable diligence, could have sold the 300 shares for said price of \$1.90 per share, the motion for a nonsuit was properly sustained. The answer of the defendant expressly pleads that the highest market price was \$1.90 per share, and avers that plaintiff neglected to sell at said figure. The replication admits that the highest market

price at the time of the order to sell was as plaintiff pleads, but says it could not be obtained after defendant's order to sell was received, although plaintiff tried to find purchasers at that figure. These pleadings raised a material issue, upon which the defendant assumed the burden of proof. The only direct evidence at all upon the fact that plaintiff could have sold at \$1.90 per share, is in his letter of October 9th, wherein he says, "500 shares sold to-day at \$1.90," coupled with the admission that plaintiff was a broker on the stock market, and familiar with stock quotations.

The division of our opinions consists in this: My learned associates say that it is too strained an inference to conclude, even on a motion for a nonsuit, that, because a broker knows of one sale of stock at the figure he was directed to sell at, he could have sold his client's stock at an equally high price, and should be held liable for not doing so. They may be correct, but upon a motion for a nonsuit, I think, under all the facts of this case, as developed by the testimony and correspondence, that probably defendant made a bare *prima facie* case of negligence on plaintiff's part. We have therefore determined to rest our affirmance of the case upon a ground on which we are thoroughly in accord, namely, that even if the plaintiff acted upon an erroneous construction of the telegram, the defendant, by his conduct, discharged plaintiff from the legal consequences of any such misconstruction.

The broker appears to have acted honestly and in good faith throughout the whole transaction between himself and the defendant. He interpreted defendant's telegram to sell for the highest market price at the date of its receipt, and acted accordingly. Thereafter the stock fell in price. Of this decline, and of the market price, the plaintiff repeatedly advised defendant, by letters, at divers times between the time of defendant's order to sell up to the close of the year 1891. The defendant never again advised him to sell, but knowingly permitted him to retain the stock, under the belief that his authority to sell was limited to the highest market price at which

it could have been disposed of at the date of the receipt of the original order of sometime previous.

We therefore have a case presented where the defendant contends that his telegram was a continuing order to sell, without limitation as to time or price, except that it be the highest when sale was made, while plaintiff argues that the order was to sell only for the price paid at the date of the receipt of the telegram, and that he had no authority to take less, and that he honestly so construed its directions. The most favorable view of the telegram, from defendant's standpoint, is that it was fairly susceptible of two constructions. Its ambiguities gave rise to this litigation, for the plaintiff, in good faith, acted upon one construction, while defendant has sued him upon another. The want of precision on defendant's part fixes the loss, if any, in such cases, upon the writer of the order, rather than upon his broker. (*Courcier v. Ritter*, 4 Wash. C. C. 549, Fed. Cas. No. 3,282.)

Under the facts a further principle governs, which may be stated as follows: Where a principal gives to his agent telegraphic instructions, fairly susceptible of two materially different constructions, and the agent honestly acts upon an interpretation not intended by the principal, yet repeatedly advises the principal of his acts, and the principal well knows of such acts, and of the agent's construction of the telegraphic instructions, but does not advise his agent of the erroneous construction of the instructions, if loss occurs to the principal by the agent's acts under his construction of such instructions, the principal must be held to have accepted the agent's construction, and cannot afterwards sue the agent for any loss which may have occurred by such acts of the agent. (*De Tassett v. Crousillat*, 2 Wash. C. C. 132, Fed. Cas. No. 3, 828; *Mechem on Agency*, §§ 315, 484, 954; *Story on Agency*, § 74; *Vianna v. Barclay*, 3 Cow. 281; *Foster v. Rockwell*, 104 Mass. 167; *National Bank of Commerce of Boston v. Merchants' National Bank of Memphis*, 91 U. S. 92; *Long v. Pool*, 68 N. C. 479; *Pickett v. Pearsons*, 17 Vt. 471; *Oil Co. v. Montague*, 65 Iowa 67, 21 N. W. 184.)

The defendant should have dissented, during their correspondence, if the plaintiff had disregarded his instructions. Not having done so, his assent to the broker's act in holding the stock must be presumed.

The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

NEIMICK, APPELLANT, v. THE AMERICAN INSURANCE
COMPANY OF NEWARK, RESPONDENT.

[Submitted June 13, 1895. Decided June 17, 1895.]

INSURANCE—*Conflict between verdict and special findings.*—In an action upon an insurance policy for six hundred dollars which contained a clause "\$1,800 total concurrent insurance permitted" a general verdict for the plaintiff was properly set aside and judgment rendered for the defendant on the special findings of the jury that there was no understanding at the time of the issuance of the policy that the insurance might be increased to the aggregate amount of thirty-six hundred dollars, as contended by plaintiff, or that prior policies aggregating eighteen hundred dollars which would shortly expire might be renewed.

SAME—*Amendment to complaint after verdict.*—In an action on an insurance policy where the plaintiff alleged and relied upon an agreement between himself and the insurance company, that additional insurance might be taken in excess of the amount, limited by the policy, and upon the trial proved that the insurance company, having knowledge of this additional insurance made no objection thereto, and, after a verdict had been returned and the jury discharged, offered to amend his complaint to conform to such proof, the amendment was properly refused as inconsistent with the agreement upon which the right to recover was based, and also because made too late.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION on fire insurance policy. Defendant's motion for judgment on special findings was granted by HUNT, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action on an insurance policy. On the 3d day of June, 1892, the defendant, through its agents, issued its policy to the plaintiff in the sum of \$600. At the same time the

same agents issued two other policies for \$600 each, of other companies represented by said agents, to plaintiff, on the same property, making an aggregate of \$1,800 insurance on the property. The policy contained this clause: "\$1,800 total concurrent insurance permitted." The property was totally destroyed by fire on the 6th day of September, 1892. After the fire it was developed that plaintiff had secured other insurance on the property to the amount of \$1,800 making a total insurance thereon of \$3,600. This additional insurance was procured in other companies than those represented by defendant's agents.

In his complaint in this suit plaintiff alleges "that prior to and at the time of making the contract of insurance between plaintiff and defendant herein, the plaintiff notified and informed the defendant's said agents of said other and prior insurance, and defendant's said agents consented and agreed that said prior insurance should remain thereon, and plaintiff then and there notified and informed said agents that said other insurance would soon expire, and that he would have, and did have, the same renewed immediately upon the expiration thereof; that the defendant's said agents, at the time said contract of insurance was entered into, knowing of and consenting to all the insurance there was on the said property, and knowing about the renewal thereof, consented and agreed thereto, and took plaintiff's application, received said premium, and issued and delivered said policy, knowing of the existence of said prior and other insurance; and then and there defendant waived any and all the conditions and requirements in said policy relative to other insurance." This allegation is denied by the answer. This seems to be the main, if not the only important, issue raised by the pleadings.

The case was tried with a jury, who returned a general verdict for the plaintiff, and the following special findings of fact: "(1) What was the value of the building at the time of the issuance of the policy sued on, to wit, the 3d day of June, A. D. 1892? Answer. \$2,300. (2) What was the value of the building at the time of its destruction by fire, to wit, on the

6th day of September, A. D. 1892? Answer. \$2,300. (3) Was it understood between plaintiff and L. F. La Croix, at the time of the issuance of the three policies by him, aggregating eighteen hundred dollars, that said plaintiff could increase the insurance of said building so that the aggregate amount of the insurance should be thirty-six hundred dollars? Answer. No. (4) Did Mr. La Croix tell plaintiff that he could renew the three old policies, which were shortly to expire, so as to make the insurance on said building \$3,600? Answer. No. The court, on motion of the defendant, set aside the general verdict in favor of plaintiff, and rendered judgment in favor of defendant on the special findings. From this judgment, plaintiff appeals.

R. R. Purcell, for Appellant.

Where there is former or subsequent insurance, which is not noted on the policy in question, if the agent knew of such other insurance and the policy be issued and continue to exist, such knowledge of the agent is knowledge of the company, and the policy is valid. (*Fishbeck v. The Phoenix Insurance Co.*, 54 Cal. 423-427; *Pitney v. Glenn Falls Insurance Co.*, 65 N. Y. 22 and 202; *May on Insurance*, § 141-145; *Woods on Insurance*, § 386, 369 and 373; *Insurance Company v. Wilkenson*, 13 Wall. (U. S.) 231; *Insurance Company v. Norton*, 96 U. S. 84, 234 and 572 and numerous cases cited in case *Fishbeck v. Phoenix Insurance Co.*, *supra*.)

C. B. Nolan and *Leon A. LaCroix*, for Respondent.

"It is a defense to an action on an insurance policy that the assured, in violation of its terms obtained other insurance without defendant's consent." (*Bowlus v. Phoenix Insurance Co.*, 32 N. E. 319; see, also: *Blanchard v. Atlantic Insurance Co.*, 33 N. H. 9; *Deitz v. Mound City Insurance Co.*, 38 Mo. 85; *Washington Insurance Co. v. Hayes*, 17 Ohio 432; *Benedict v. Ocean Insurance Co.*, 31 N. Y. 389; *Insurance Company v. Slockblower*, 26 Pa. St. 199; *Sugg and wife v. Hart-*

ford Insurance Co., 3 S. E. Rep. 732; *Mattocks v. Des Moines Insurance Co.*, 37 N. W. Rep. 174; *American Insurance Co. v. Replogie*, 15 N. E. Rep. 810; *Havens v. Home Insurance Co.*, 12 N. E. Rep. 137; *Ordway v. Continental Insurance Co.*, 35 Mo. App. 426; *Johnson v. American Insurance Co.*, 43 N. W. Rep. 59; *Hutchinson v. Western Insurance Co.*, 21 Mo. 97; *Quinlan v. Prov. Wash. Insurance Co.*, 133 N. Y. 356; *Golden v. Northern Ass. Co.*, 49 N. W. Rep. 246.)

PEMBERTON, C. J.—The appellant contends that the general verdict is not inconsistent with the special findings, and that the court erred in so holding.

The plaintiff alleges in his complaint an understanding or agreement with defendant's agents that he might increase his insurance on the property to the sum of \$3,600. This the defendant denied. This issue was included in the special findings submitted to the jury. They found that there was no such understanding or agreement. If there was no such agreement, plaintiff, it is conceded, could not recover. The general verdict for plaintiff was necessarily inconsistent with the special findings that no such agreement was entered into between the parties.

The plaintiff, after defendant had moved the court for judgment on the special findings, asked leave to file amendments to his complaint, to the effect that defendant's agents had knowledge of this additional insurance, irrespective of said agreement, on the property, before its destruction, and made no objection thereto. Counsel for plaintiff contends that there was evidence of such knowledge, and that he was entitled to amend his complaint in conformance therewith. He contends also that this made an issue not covered by the special findings, and on which the jury might have found their general verdict; and, if so, he says the court erred in setting aside the general verdict, and rendering judgment on the special findings.

We think this amendment inconsistent with the agreement alleged in the complaint as a basis of plaintiff's right to recover in the case. And, furthermore, if the plaintiff desired

to avail himself of the right to so amend, he should have made his offer at the close of the testimony, and asked for a finding thereon. When he offered his amendment the verdict and findings had been made and returned, the jury had been discharged, and the court was considering a motion for judgment on the verdict and findings. We are unable to discover any abuse of discretion on the part of the trial court in disallowing the amendment. It seems to us, from a careful consideration of the record, that the case was fairly tried on the pleadings and evidence, and a proper result reached.

The judgment is affirmed.

Affirmed.

DE WITT, J., concurs.

HUNT, J., having presided at the trial of this suit, takes no part in the decision.

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ELKHORN TRADING COMPANY, APPELLANT, v. TACOMA MINING COMPANY, ET AL., RESPONDENTS.

[Submitted June 14, 1895. Decided June 17, 1895.]

CORPORATIONS—Annual report—Liability of trustees.—Under section 460, Fifth Division of the Compiled Statutes, every company is required to file an annual report showing, among other things, the amount of existing debts, and if any such company fails to do so, as provided in this section, all the trustees of the company become jointly and severally liable for all its indebtedness existing at the time such report should have been filed. (*Gans v. Switzer*, 9 Mont. 408, cited.)

SAME—Estoppel to assert right of action against trustees.—In the case at bar B. was the general manager of the plaintiff trading company and was also one of the trustees of the defendant mining company and kept the books of both companies. After the mining company had ceased operations, the trustees thereof, in order to make out the annual report required by section 460, Fifth Division of the Compiled Statutes, inquired of B. what the amount of the company's indebtedness was to the plaintiff. He informed them that the mining company did not owe anything to the plaintiff and that the indebtedness to others was but trifling and he advised them not to make any annual report. They relied upon B.'s statement and, so relying thereon, omitted to make and file the annual report. It appeared that the statements were made by B. in order that the plaintiff might secure a personal liability against a trustee of the mining company who was financially responsible. *Held*, that the plaintiff was estopped to assert a right of action against the trustees of the mining company for a debt due from it to the plaintiff.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for debt. The case was tried before BUCK, J. Defendants had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action for debt, brought against the respondents, Tacoma Mining Company and W. R. Rust. The indebtedness is that of defendant the mining company. Judgment was also demanded against defendant Rust on the ground that he was one of the trustees of the mining company, and, as such, neglected to file the annual statement required by the law of this state.

At the opening of the trial, the following stipulation was made: "Before the introduction of any testimony, it was stipulated by and between the plaintiff and the defendant in the above-entitled action, in open court, that the plaintiff should recover judgment against the said defendant the Tacoma Mining Company for the sum of \$1607.11; and that, unless this court should find that the defense of the defendant Rust constitutes a bar to this action as to him, the plaintiff is entitled to recover that amount from the said defendant Rust, as one of the trustees of the said defendant corporation."

It was admitted on the pleadings, by Rust, that the Tacoma Mining Company did not in the year 1891 file their annual statement, as required by section 460, div. 5, Comp. St., which is as follows: "Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of said company is carried on, which shall state the amount of capital and of the proportion actually paid in and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of

the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said company shall fail to do so, all the trustees of the company shall be jointly and severally liable for all debts of the company then existing, and for all that shall be contracted before such report shall be made. No liability shall attach to any trustee, or board of trustees, by virtue of the provisions of this section, for a failure to cause to be published in a newspaper the report in this section mentioned, if within the time herein mentioned said trustee, or board of trustees, or company, shall annually cause said report to be filed in the office of the county clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation."

In defense against his personal liability as trustee, defendant Rust pleaded an estoppel. The facts constituting the estoppel were as follows: George J. Bottcher had general charge of the business of the Elkhorn Trading Company, located at the town of Elkhorn. He was treasurer and local manager, and had general local supervision. He had charge of all the accounts. The Tacoma Mining Company was doing business near the town of Elkhorn. Bottcher was also one of the trustees of and a stockholder in the mining company. He kept the books also of the mining company. The financial business of the mining company was transacted through the trading company. All remittances for ores sold by the mining company were sent to the trading company, and placed to the credit of the mining company on the trading company's books. The latter was the disbursing agent of the mining company. In the summer of 1891 it appeared that the mining company ceased operations. The trustees of the mining company went to Mr. Bottcher, at his place of business, for the purpose of making out the annual statement of the mining company, as required by section 460, *supra*. In order to make out such statement, they inquired of Bottcher what the indebtedness of the mining company was to the trading company. Bottcher

informed them that the mining company did not owe the trading company anything whatever, and that the mining company had no debts at all, except \$30, which was due to persons other than the trading company, and that, therefore, it was not necessary to make out any annual statement. Bottcher advised them not to make such statement, for the reason that they owed no debts, except the \$30, and that there was enough money in the hands of the trading company to pay that amount. The trustees of the mining company believed what Mr. Bottcher told them. They had no other means of obtaining the information as to whether the mining company owed the trading company, Bottcher being the bookkeeper for both concerns. They relied upon Mr. Bottcher's statement, and, so relying upon it, omitted to prepare and file the annual statement. Afterwards, and in November, Bottcher presented to the trustees of the mining company the claim for indebtedness upon which this action is brought. It furthermore appears by the testimony of Smith, one of the trustees of the mining company, that at that time, in November, and after it was too late to file the statement for that year, under the statute, Bottcher told said trustee Smith that the reason he had not presented this statement of indebtedness before was that if the Tacoma Mining Company did not file an annual statement, as required by law, W. R. Rust was the only person responsible in the Tacoma Mining Company, and that he would have to pay the debts, thereby saving the Elkhorn Trading Company.

Such is a brief resume of the facts. The case was tried to the court without a jury. The court found that these facts constituted an estoppel in favor of Rust, as against the plaintiff, and rendered judgment for defendant Rust. From the judgment in favor of Rust, and from an order denying a new trial, the plaintiff appeals.

George F. Shelton and Henry N. Blake, for Appellant.

Section 460, fifth division of the Compiled Statutes has been construed by this court in *Gans v. Switzer*, 9 Mont. 408.

The plaintiff maintains that it was decided in that case that there could be no exception to the mandatory language of said section. (See the opinion in that case, pages 414, 416, and 418: see, also, the language of this court in *Teitig v. Boesman Bros.*, 12 Mont. 454.) Similar statutes of other states have received the same construction. (*Merchants' Bank v. Bliss*, 35 N. Y. 416, 417; *Miller v. White*, 50 N. Y. 139, approved and quoted in *Gans v. Switzer*, *supra*; *Whitney A. Co. v. Barbour*, 62 N. Y. 65, 66; *Whitney v. Cammann*, 137 N. Y. 342; *Gregory v. German Bank*, 3 Colo. 333, 334; *Larson v. Fames*, 1 Colo. App. 315; *Thayer v. New England Co.*, 108 Mass. 528.) Sections 458, 460, 461, 462 and 463 should be construed together to arrive at the legislative intent that other subjects of the reports are deemed as vital as debts. There is no allegation in the answer of Rust, and there is no testimony that Bottcher or any agent of the Elkhorn Trading Company ever said anything to cause the trustees of the Tacoma Mining Company to neglect or fail to publish or file the report, showing the amount of capital and of the proportion actually paid in to the Tacoma Mining Company. According to the foregoing authorities the public is entitled to this information. The testimony does not prove that any regular meeting of the trustees of the Tacoma Mining Company was held at its place of business to consider the publication or to file said report. The answer alleges that Rust, Smith and Bottcher were together at the office of the Elkhorn Trading Company in August, 1891. It does not appear from the testimony that there was any notice of this meeting or formality of any kind. No record of this meeting was offered in evidence. The trustees did not duly assemble and said meeting had no validity, and the testimony thereof, to which the appellant objected, should have been excluded by the court below. (*Angel & Ames Corp.* § 496; *Doernbecher v. C. C. L. Co.*, 21 Or. 573; S. C. 28 Am. St. 766; *Wiggin v. Free Will B. Church*, 8 Met. 301; *San. B. M. Co. v. Vassault*, 50 Cal. 534; *Smith v. Dorn*, 96 Cal. 82, 83.) It should be observed that a majority of the trustees referred to by the witnesses for Rust, comprise

Rust, J. T. Smith and Bottcher, and without Bottcher there is no proof that the majority of said trustees ever met at any time or place. Yet under such circumstances the court below held that Bottcher was acting for the appellant alone, and not as a co-trustee with Rust and Smith of the Tacoma Mining Company. Under the issues in this case, the statements of Bottcher could not justify Rust in failing to comply with the plain letter of said section 460. Neither the Elkhorn Trading Company, nor any other corporation, can clothe an agent with power to violate a law or procure its violation by others. (Story on Agency, § 11; Mechem on Agency, §§ 19, 20.) Conceding for the sake of argument that Bottcher made the statements imputed to him by Rust and Smith, their real import was to induce Rust to disobey a statute, which public policy upholds. A defense of this character should not be tolerated.

Ashburn K. Barbour, for Respondent.

Where a company induces a purchaser of its stock to alter his condition by relying upon its assurances that it has no adverse claim on the stock, it cannot be permitted to assert a lien thus lost by its own laches, and the enforcement of which would operate as a fraud. (*Cecil Nat'l Bank of Port Deposit v. Watsonstown Bank*, 105 U. S. 217-223; *Cocheco Nat'l Bank v. Haskell*, 51 N. H. 116; *Sturges & Co. v. Bank of Circleville*, 11 Ohio St. 153.) "A fact once admitted by a corporation, through its officers duly and properly acting within the scope of its authority, is evidence against it, and cannot be withdrawn to the prejudice of any one who in reliance thereon has changed his situation in respect to the matter affected thereby." (*O'Leary v. the Board of Education of the City of New York*, 93 N. Y. 1.) A principal is bound by the acts of his agent, and declarations in carrying out and transacting any business delegated to him. (Mechem on Agency, § 714 and note, § 743.) Bottcher was surely acting within the apparent scope of his authority when called upon by a

debtor of the concern for a statement of the accounts for the purpose of securing a settlement, he made the statement set forth in respondent's answer. (*Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 36; *West Maryland R. R. Co. v. Franklin Bank*, 60 Md. 36.) Where one by his own words willfully causes another to believe in a certain state of facts, first stating that he is not the owner of certain property, and thus inducing him to act upon such belief, so as to lose his own previous condition, the former is concluded from afterwards averring against the latter a different state of things from what he then represented. (*Blodgett v. McMurtry*, 52 N. W. Rep. 707, and cases therein reviewed; *St. Louis Wrought Iron Co. v. Range Company*, 48 N. W. Rep. 395; *Davis v. Handy*, 37 N. H. 65; *Insurance Co. v. Mahone*, 21 Wall 152; *Mays case*, 25 Wis. 306; *Wilkinson's case*, 13 Wall 223.) The false statements of Bottcher did surely cause the respondent and J. T. Smith to alter their position, by inducing them to abstain from filing the annual report of the mining company, and thereby subject themselves to personal liability, if the appellant is now permitted to aver a different state of facts against them. The provisions of the general manufacturing act, making the trustees of a corporation organized thereunder liable for the debts in case of failure to file the annual report required by the act, does not include an indebtedness imposed upon the corporation by fraud or improper practice of the creditor. (*Adams v. Mills*, 60 N. Y. 533; *Fouch, assignee, v. Brown*, 74 Ga. 251.) For a recent and exhaustive case on the subject of the liability of a corporation upon the fraudulent representations of its agents, and that when the statements are not authorized by the company, see *Nevada Bank v. Portland Nat'l Bank*, 59 Fed Rep. 338. The proposition that a director of a company acting avowedly for himself or on behalf of another with whom he is interested in any transaction, cannot be treated as the agent of a corporation therein, is well sustained by authority. (*Innerity v. Merchants' Nat'l Bank*, 139 Mass. 332; 52 Am. Rept. 713, and cases therein cited by the court; *First Nat'l Bank of Hagertown v. Christopher*, 40 N. J. l. 435; *Winchester &*

Lemmon v. Baltimore & Co. R. R. Co., 4 Md. 235; *Wicksam v. Chicago Zinc Co.*, 18 Kans. 481; *First Nat'l Bank v. Harris*, 10 Fed. 256; *Dillaway v. Butler*, 135 Mass. 479; *Mechem on Agency*, § 723 and note.) It was not essential that these directors should have been assembled in a formal meeting in order to be deceived by the false representations of Mr. Bottcher. It will be presumed in the absence of evidence to the contrary, that all of the directors of the company were duly notified of the meeting. (*Choutau Ins. Co. v. Holmes*, 68 Mo. 601; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402; *Leavitt v. Oxford & Co. Min. Co.*, 3 Utah 265; *Chamberlain v. Painesville & Co. R. R. Co.*, 15 Ohio 225.)

DE WITT, J.—It is clear that under section 460, Fifth Division of the Compiled Statutes, defendant Rust, by reason of the neglect of himself and the other trustees of the Tacoma Mining Company to file its annual statement, became liable for the indebtedness here sued upon by the plaintiff. (*Gans v. Switzer*, 9 Mont. 408.) But, under the facts in this case, may the plaintiff assert Rust's liability? Is not plaintiff estopped? It was clearly within Bottcher's authority, as general manager of plaintiff, to state what the indebtedness was of the mining company to plaintiff. Bottcher was the only person who knew the facts. He kept the books of both companies. (See statement of the case preceding this opinion.)

Some of the general principles of estoppel we find epitomized in *Herman on Estoppel and Res Judicata* (volume 1, § 7), as follows: “(1) If a man, by his words or conduct, willfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. (2) If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain

way, and it is acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

These are elementary principles. Let us apply to them the facts in this case. The plaintiff acted through Bottcher, its agent. Bottcher acted within his authority. He was cognizant of all the facts, and the only person who knew them. He willfully endeavored to cause the defendants to believe a certain state of things, to wit, that the mining company did not owe anything to the plaintiff. He knew that that statement was false, and it appears in testimony that he said that he made that statement for the purpose of inducing the mining company and its trustees to refrain from filing their annual statement, in order that the plaintiff, of which he was manager, might secure a personal liability against defendant Rust. The defendant Rust believed these false statements. He relied upon them. He acted upon this information and belief. If the trustees of the mining company had not so relied upon this information and belief, they would have filed their annual statement, and then there would have been no personal liability on the part of Rust as trustee. Therefore, applying the rule of estoppel, plaintiff cannot now aver, as against Rust, that there was a debt of the trading company against the mining company. This seems to be a perfectly clear case of estoppel. While it is true that plaintiff has, under the statute, its right of action against defendant Rust, it is also equally true, under the rules of estoppel, that the court will not hear the plaintiff assert it.

It is claimed by the appellant that section 460, *supra*, is a penal statute, and that the penalty, being incurred, must be enforced. Whatever may be the exact meaning of the expression "penal" (*Gans v. Switzer*, 9 Mont., at page 413), here the fact is that the person in whose favor the penalty is given by the statute is the person who willfully deceived defendant Rust, and deliberately induced him to place himself in a position where the plaintiff hoped to be able to enforce the penalty.

However true it may be that the penalty was incurred, there is no reason for setting aside the well-recognized doctrine of estoppel in such a clear and simple case as this. The plaintiff cannot take advantage of its own wrong, deception and fraud. This court will not listen to such a proposition for a moment. It is shocking to law and to morals. The judgment is affirmed. Remittitur forthwith.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

KEYSER, RESPONDENT, v. REHBERG, APPELLANT.

[Submitted June 16, 1895. Decided June 22, 1895.]

CONTRACT—Breach—Quantum Meruit.—Where defendant employed plaintiff as a foreman upon his ranch for one year under a contract by which the plaintiff was to receive as his compensation all the proceeds of the ranch products in excess of a certain sum, but before the expiration of the year the plaintiff, without fault of his own, is compelled to leave the ranch through the assaults, threats and orders of the defendant, he may recover upon *quantum meruit* for the services rendered to the time when defendant's conduct made the completion of the contract impossible.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to recover for services rendered. Plaintiff had judgment below. Defendant's motion for a new trial was denied by HUNT, J. Affirmed.

C. W. Fleischer and Sydney Sanner, for Appellant.

C. B. Nolan and Leon A. LaCroix, for Respondent.

Performance by plaintiff having been rendered impossible by the act of the defendant, plaintiff not being in fault, he may recover upon a *quantum meruit*. (*Helem v. Wilson*, 28 Am. Dec. 336; *Duncan v. Baker*, 21 Kan. 99; Bishop on Contracts, §§ 1441 to 1447; 3 Am. and Eng. Enc. of Law,

921; *Moulton v. Frask*, 9 Metc. 577; *Felton v. Dickenson*, 10 Mass. 287; *Baker v. Corey*, 19 Pick. 496; *Isaacs v. McAndrews*, 1 Mont. 437; *United States v. Behan*, 110 U. S. 168.)

PER CURIAM.—This is an action for work, labor, and services alleged by plaintiff to have been rendered to the defendant as a superintendent or foreman upon the ranch of the defendant. The defense set up in the answer was that plaintiff and defendant made a contract by which the plaintiff should conduct the affairs of the ranch for a year, and that defendant should receive \$1,000 from the products of the ranch for that year, and that all over that sum should belong to the plaintiff. The replication of plaintiff admits that the contract between the parties was substantially similar to that alleged in the answer, and pleads further that before the completion of the contract the defendant ordered the plaintiff to leave the ranch, and drove him away by the use of dangerous weapons.

It appeared by the evidence that a serious altercation took place between the parties before the termination of the year. The defendant, in his testimony, endeavored to make it appear that he was not greatly in fault, while the plaintiff's testimony was that defendant ordered him absolutely away from the premises, and assaulted him with a plowshare, and threatened to run him through with a pitchfork, and also threatened an attack with an iron rod. The testimony of the plaintiff was that he was compelled to leave the ranch by reason of the conduct of the defendant. There is ample evidence in the record to sustain the plaintiff's position,—that he was driven from the ranch by the assaults, threats, violence and orders of the defendant, and that he did not leave through any fault of his own.

If the defendant, by his own conduct, made it clearly impossible for the plaintiff to complete the contract which had been made between the parties, the plaintiff may recover upon *quantum meruit* for the services which he had performed up to the time when the defendant made it impossible for plaintiff to continue work under the contract.

The trial was before the court without a jury, and the court evidently believed the testimony of the plaintiff, and found for plaintiff in the value of his services as a laborer upon the ranch. The court also allowed a counterclaim of \$171 in favor of the defendant.

The evidence is ample to sustain the judgment and the decision. The appeal is from the judgment, and also from an order denying a new trial. There is no judgment in the record in the case, and that appeal must be dismissed. The order denying a new trial is affirmed.

Affirmed.

BURNS, RESPONDENT, v. PAULSEN, ET AL., APPELLANTS.

[Submitted June 17, 1895. Decided June 24, 1895.]

APPEAL—Evidence.—On an appeal from the judgment, the evidence when not contained in the record, will be presumed to support the judgment.

INTEREST—Pleading.—Averments in a complaint that the defendants have not paid any part of the sums demanded; that they have been often requested so to do, but have wholly refused to pay the same, to the unreasonable and vexatious delay of the plaintiff, are sufficient to sustain a judgment for interest.

FRIVOLOUS APPEAL—Penalty.—A penalty for a frivolous appeal will be imposed by this court in affirming a judgment from which an appeal was taken apparently for delay and vexation of the plaintiff.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for debt. Judgment was rendered for plaintiff below by BUCK, J. Affirmed.

McConnell, Clayberg & Gunn and *O. W. McConnell*, for Respondent.

PER CURIAM.—This action was brought by plaintiff to obtain judgment for \$546, balance of an account owing by defendants for personal services, also for \$92.95, money advanced by him to defendants, and also for \$100 on an account

assigned to plaintiff by the Boyce National Bank. The case was tried to the court without a jury, and judgment rendered for plaintiff for the whole of the several sums. The court also gave judgment for interest, by reason of unreasonable and vexatious delay. Defendants appeal from the judgment. No motion for new trial was made, and the evidence is not before us. It is presumed that the evidence sustained the judgment.

The only point raised upon the appeal is that judgment should not have been rendered for interest. In the absence of the evidence, we must presume that it was sufficient to sustain the finding of unreasonable and vexatious delay. We are also of opinion that the complaint in this respect is sufficient. It alleges that the defendants have not paid any part of the sums demanded; that they have been often requested so to do, but have wholly refused to pay the same, to the unreasonable and vexatious delay of the plaintiff. (*Jefferson Co. Com's v. Linberger*, 3 Mont. 246; *Maddox v. Rader*, 9 Mont. 138.) The judgment is affirmed, with costs.

This appeal was absolutely frivolous. There is not even a contention that the judgment for the amount claimed was not proper. While a brief was filed on the part of the appellants, contesting the allowance of interest, counsel did not appear to argue the case, and the suggestion that the pleading is not sufficient to sustain the judgment for interest is equally frivolous. It is perfectly apparent that the only object of the appeal is delay, and the vexation of the plaintiff. In order to discourage such appeals, it is ordered that a penalty of \$75 be imposed upon the defendants for a frivolous appeal, and that the judgment of the district court, as affirmed, be increased in said amount. (*Clark v. Nichols*, 3 Mont. 372; *Wyckoff v. Loeber*, 5 Mont. 535; *Ramsey v. Cattle Co.*, 6 Mont. 498; *Second National Bank v. Kleinschmidt*, 7 Mont. 146.)

Affirmed.

HOLLENBACK, RESPONDENT, v. DINGWELL ET AL.,
APPELLANTS.

[Submitted June 18, 1895. Decided June 24, 1895.]

DAMAGES—Contributory negligence—Breaking of dam.—Failure of a person living on a stream below a dam, and having knowledge of its dangerous condition, to institute proceedings to have the dam judicially examined and made secure or removed, as authorized by the provisions of chapter 56, Fifth Division of the Compiled Statutes, does not constitute contributory negligence so as to defeat his right to recover for damages resulting from the subsequent breaking of the dam.

Appeal from Third Judicial District, Deer Lodge County.

ACTION for damages. Plaintiff had judgment below. Defendants' motion for a new trial was denied by WOODY, J. Affirmed.

Cole & Whitehill and Cullen & Toole, for Appellants.

In February, 1877, a law was passed by the legislature of the territory of Montana, covering generally the subjects of dams and reservoirs, providing for an examination into their sufficiency, trial by jury, without cost or expense to the complainant, in cases where his complaint was sustained, and with ample provisions for the abatement of the nuisance, etc. (Page 912 to 916, Rev. Stats. of Montana.) The foregoing statute would have afforded ample protection in this case, if its wise provisions had been invoked. The plaintiff is presumed to have known of its existence. Where the law exacts the exercise of ordinary prudence upon the part of one to prevent damage, and supplies the machinery necessary to obviate the damage, and it does not involve a trespass upon the property of another, "ordinary prudence" cannot be said to consist in standing defiantly in the pathway of known danger, trusting to a lawsuit to compensate him, when he might have averted it. "The fact that the plaintiff might have abated a nuisance caused by obstructing a ditch, but did not, it being necessary to go upon the defendant's land for that purpose, will not af-

fect his right of action for damages. Where, however, the plaintiff has access to the nuisance, or the means or opportunity of avoiding or mitigating the injury which causes it, it is his duty to abate the nuisance, or take the proper measures for preventing or lessening the damages therefrom. Where this duty arises, damages are limited to such as are or would be suffered if the duty had been performed, added to the expense incident to the performance of that duty. If the plaintiff, having the opportunity, without incurring a liability for trespass, neglects to exercise ordinary care and diligence to prevent injury, he may be denied any recovery on the ground of contributory negligence." (Sutherland on Damages, Vol. 3, page 420-421; *Van Pelt v. City of Davenport*, 42 Ia. 308; *Simpson v. City of Keokuk*, 34 Ia. 568; *Locker v. Diamond*, 17 Pick. 288; *Hamilton v. McPherson*, 28 N. Y. 76; Field's Lawyers' Brief, Vol. II, p. 390, and cases cited. *Chase v. New York Central R. R. Co.*, 24 Barb. 273; *Little v. Maguire*, 43 Ia. 448; Beach on Contributory Negligence § 13; *Flemming v. W. P. R. Co.*, 49 Cal. 257; *Glasscock v. Cent. Pac. R. R. Co.*, 73 Cal. 137; *Abend v. Terre Haute & Indianapolis R. R. Co.*, 53 Am. Rep. 619-20.)

Rogers & Rogers and W. H. Trippet, for Respondent.

Counsel cited: 16 Am. & Eng. Ency. of Law 990, Beach on Contributory Negligence, §§ 20, 21, 24, 25, 26, 31, 33, 34, 45, 54 and 59; *Texas Etc. R. Co., v. Young*, 60 Tex. 201; *Hays v. Gainesville Street Ry. Co.*, 8 Am. St. Rep. 624 and note; *Wolf v. St. Louis I. W. Co.*, 15 Cal. 319; *Beers v. Board of Health*, 48 Am. Rep. 256.

HUNT, J.—The plaintiff, a ranchman living on Griff creek, sues the defendants for negligently constructing and maintaining a dam used to store quantities of water at the outlet of Griff Lake, about 4½ miles above plaintiff's ranch. In June, 1892, the dam broke away, and the body of water behind it ran down upon plaintiff's farm, washing away the soil, destroying the buildings, tearing up his fences and crops, and

generally doing him great damage. The jury awarded the plaintiff damages in the sum of \$1,200. The defendants moved for a new trial, and appeal from the order denying said motion.

The defendants do not contend in this court that the plaintiff was not injured by the breaking away of the dam, nor is there any question raised of the justness of the amount awarded, provided the plaintiff could recover at all, so that we need only consider the single point presented—whether the verdict of the jury is against the law.

The court, after charging the jury upon the law of negligence, and as to the measure of care necessary to be exercised on the part of defendants, instructed as follows: “The jury are instructed that the plaintiff had a right, without incurring liability for trespass, under the laws of the state of Montana, to have said dam examined and declared a nuisance, and to have had the same abated, without costs to him, if the same was dangerous to life or property by reason of its negligent construction, or any other defect therein, whereby the same was unsafe or dangerous to life or property situate or being upon the stream below it. And if you believe from the evidence in this case that the plaintiff, for a year, or a longer period, immediately prior to the breaking of said dam, had the opportunity to know that said dam was in a dangerous and unsafe condition, and that he believed it was dangerous and unsafe, then it was his duty, as an ordinarily careful, prudent, and discreet man, to have invoked the law of the state, and have had said dam examined, and, if found unsafe, to have had it removed, or the nuisance abated, so as to prevent said injury and damages to his property, as the law makes it the duty of a person who has the means or opportunity of avoiding an injury, without committing a trespass upon the property of another, to take the proper measures to abate the nuisance and prevent the threatened injury and damages, and if he fails to do so he is guilty of contributory negligence, and cannot recover.”

The law of the state referred to in the instruction is the act

of February 16, 1877, concerning dams and reservoirs (chapter 56, Fifth Division of the Compiled Statutes.) By the provisions of the law just cited, persons constructing or using dams or reservoirs are required to build them in a substantial manner, so that they will safely and securely hold waters, if upon the stream upon which any such dam or reservoir is situated, and below the same, there are settlers whose lives may be endangered, or valuable property which may be damaged or destroyed, by the breaking of such dam or reservoir and the escape of the waters therefrom. It is further provided by said law that if any one makes a complaint to the effect that any person is filling a dam or reservoir, and that life or property is or will be thereby endangered, the district judge shall appoint three persons to examine the dam or reservoir, and determine as to its security. These persons shall report to the district judge. If they find that it is imminently dangerous they are empowered to draw the waters from the reservoir, to insure the safety of the persons and property below the same, or if they find it insecure, but not imminently dangerous, they shall report their finding to the district judge, who is required to cause a copy of said finding to be served on the owners of the dam, with a notice to proceed forthwith to make the dam secure, or to draw the water without delay, and that unless the owner comply with the notice, or shall show that the dam is secure, or that no property or life would be endangered by its giving away, it shall be the duty of the district judge to issue a writ commanding the sheriff to draw from said dam the waters thereof. The hearing provided for shall be before a jury of twelve. An appeal may be taken upon giving to the persons holding property on said stream, below said dam, security against loss or damage resulting from the bursting of said dam or reservoir. The person making complaint of the insecurity of the dam shall, in the first instance, advance the necessary expenses of the jurors, and their fees, which sums may be recovered when judgment is rendered. Any person guilty of erecting or maintaining a dam or reservoir which endangers life or property in the manner provided

for in the chapter referred to shall be deemed guilty of erecting or maintaining a nuisance, and, being thereof convicted, shall be punished as provided by law.

It is admitted that plaintiff did not institute any proceeding, under this statute or otherwise, to have the dam declared dangerous, or a nuisance to the public. The jury, therefore, by finding for the plaintiff, utterly disregarded the particular instruction quoted above.

In passing upon the motion for a new trial, however, the learned judge of the district court permitted the verdict to stand, entirely changing his view of the law as given in the first instance, thereby holding that an omission to invoke the aid of the statutory right to have the safety of the dam inquired into by judicial proceeding was not an act of negligence on plaintiff's part, which so far (if at all) contributed to the overflow of his farm as to preclude him from obtaining relief in this action.

The appellants do not ask the court to reverse the case upon the question of practice,—that because the jury confessedly disregarded the law as given to them by the court, whether right or wrong, a new trial should be had,—but rely upon the ground that the instruction, as given, was the law, and that the jury, under the plain facts in evidence, disobeyed the law when they awarded plaintiff damages, it being an undisputed fact that he had never complied with the provisions of the statute authorizing complaint to be made before the district court. But it appears clear to us that the statutes which authorized proceedings to have a dam examined, to determine its safety or danger, and to try that issue, simply declare a permission and right, and prescribe how the same may be availed of, without imposing any legal duty whatever. (*Texas, etc., Railroad Co. v. Young*, 60 Tex. 201.) Surely, to maintain a dam which imperils the safety of many people is a nuisance; hence the right to have the same abated was in the plaintiff, whether conferred by statutory authority or by the common law. (*Wood on Nuisance*, § 3; *Mayor, etc., v. Bailey*, 2 Denio 433.)

A method was fixed by statute by which inquiry could be had into the construction of the work, for the purpose, evidently, of laying down a plain, certain, and expeditious procedure, capable of being summarily invoked by one who considered himself or his property in great or imminent peril. But we cannot believe that a compliance with the method is a condition precedent to maintaining a suit in negligence for the breaking of the dam. Plaintiff simply omitted to invoke a special proceeding whereby suspicion of great danger might be acted upon by following a statute, and advancing fees and costs as a guarantee of good faith. How can it be said that plaintiff was guilty of negligence at all, or how could such omission be said to be the juridical cause of the breaking of the dam? "The negligence of plaintiff," says Wharton on Negligence (section 324), "to make it a juridical cause, must be such that by the usual course of events it would result, unless independent disturbing moral agencies intervene, in the particular injury. It may be negligence in me to cross a railroad on a level, when, by going a mile round, I could cross on a bridge. Yet this negligence, in case I am struck by a train, is not the juridical cause of the collision, if I keep a good lookout when I reach the road. I may negligently leave my goods in a warehouse, but this is not the juridical cause of their destruction, if such destruction comes, not as a natural and usual result of my negligence, but through the negligence of another, who sets fire to the warehouse." The defendants' dam did not overflow and break because the plaintiff omitted to complain of its construction before the district judge; that is, there is a total lack of connection of cause and effect necessary to be established to justify the argument that plaintiff contributed to his own damage. (Shear & R. on Negligence, § 25; Thompson on Negligence, p. 1151.)

It is beyond dispute that defendants were in duty bound to use all reasonable care to maintain their dam in a safe and suitable condition with relation to its uses and to the safety of life and property of others below them on the creek. (Angel on Water Courses, § 336; Cooley, Torts, p. 570; *Gray v.*

Harris, 107 Mass. 492.) And it was a breach of this duty that caused the plaintiff's damage, without any act of omission on plaintiff's part, amounting to a want of ordinary care, which produced the breaking or overflow. "The two essential elements in contributory negligence are a want of ordinary care on the part of the plaintiff, and a casual connection between that and the injury complained of; the rule being that a plaintiff cannot recover damages for an injury he has sustained, if the injury could have been avoided by the exercise of ordinary care on his part." (Beach on Contributory Negligence, § 9.)

Plaintiff did all that could be reasonably expected of him. He notified the defendants of the condition of their dam. He had a perfect right to live upon the creek, and it would be highly unreasonable to require him to repair a defectively constructed dam belonging to others, and for the defectiveness of which he was in no wise responsible. It would likewise be a bad precedent to exonerate the defendants, otherwise clearly negligent, because a settler below them did not avail himself of the statutes quoted, which, as we have said, were a permission expressly accorded to him, but certainly never were intended to shield those who were careless from liability in damages for the consequences of negligently maintaining a fearful danger to those lawfully occupying their homes below the point of such danger.

These views render it unnecessary to discuss principles which might be applicable if plaintiff was a transgressor himself, seeking to hold defendants liable for their negligent acts. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

SELL, RESPONDENT, v. GRAVES, APPELLANT.

[Submitted June 21, 1895. Decided June 24, 1895.]

TRESPASS—Possession—Townsite.—Where plaintiff in trespass had sold the land, but was remaining in possession by permission of his grantee, a townsite company which had regularly platted it as part of a townsite, his possession is sufficient to maintain the action as against a naked trespassor who enters without claim or color of title.

Appeal from Tenth Judicial District, Flathead County.

ACTION for damages for trespass. Judgment was rendered for the plaintiff below by DuBOSE, J. Affirmed.

McIntire & Clinton, for Appellant.

Sanford & Grubb and Walsh & Newman, for Respondent.

PER CURIAM. —This action was brought to recover damages for the trespass of defendant in entering land in possession of plaintiff, and cutting the grass thereupon. There was a judgment in favor of plaintiff for \$35. Defendant appeals from the judgment and the order denying the motion for a new trial.

It appears that the plaintiff, in February, 1891, had sold the land upon which the hay was cut, to the Kalispell Townsite Company. At the time of the sale it was agreed that the plaintiff should remain in possession of the premises until he could cut the grass which should grow upon the land that year. This agreement was not inserted in the deed as a reservation, but it appears by the testimony that this agreement was also made after the deed, and that the townsite company left the plaintiff in possession of the land, and protected him in such possession by all means within its power. The plaintiff was residing upon the land, and had a fence around the whole of the same, except for a short distance on one side, and at that place he kept a herder to keep stock out. Under these circumstances, the defendant entered and cut the grass.

The appellant's defense was that there was not sufficient possession of plaintiff to maintain trespass, and that he (appellant)

had cut the grass upon the streets and alleys of the townsite of Kalispell. It is true that the land had been laid out as a townsite, and the survey properly made and filed. We are of opinion that the facts showed a sufficient possession in the plaintiff to maintain this action against an absolutely naked trespassor, without right or title, or claim or color of same. We have examined the record and the instructions, and are of opinion that the case was fairly presented to the jury, and that there was no substantial error upon the trial which would justify us in disturbing the result. The judgment and order are affirmed.

Affirmed.

STATE, RESPONDENT, v. PUGH, APPELLANT.

16 343
27 339

[Submitted June 21, 1895. Decided June 26, 1895.]

HOMICIDE—Evidence—Res gestae.—On a trial for murder, evidence of statements made by the defendant when captured about a quarter of a mile away from where the shooting took place and immediately after having fired the fatal shot, to the effect that the deceased hit him in the face and then he shot him, and of statements made by the deceased a short time after the shooting, that the defendant applied to him opprobrious epithets and he struck him, was properly excluded, as such statements were the narrations of events that had passed and not part of the *res gestae*. (*Territory v. Clayton*, 8 Mont. 1, cited.)

SAME—Murder in the first degree—Review on appeal.—Where the court fully and fairly instructed the jury as to the law of the case, and there was ample evidence to sustain the verdict of murder in the first degree, such verdict will not be disturbed on appeal.

SAME—Impeachment of witness—Identification of evidence taken before coroner.—On a trial for murder, evidence taken before the coroner and offered by the defendant for the purpose of impeaching the state's witnesses, was properly excluded where such evidence was in no way identified as that taken before the coroner, nor was it presented to the witnesses sought to be impeached to enable them to say whether it was their testimony given before the coroner, nor was it shown that, if admitted, it would have contradicted any witness as to any material matter.

Appeal from Fifth Judicial District, Jefferson County.

CONVICTION for murder in the first degree. The defendant was tried before SHOWERS, J. Affirmed.

J. C. English and C. L. Campbell, for Appellant.

Henri J. Haskell, Attorney General, for the state, Respondent.

PEMBERTON, C. J.—On the 14th day of April, 1895, the above named defendant was convicted of the crime of murder in the first degree, in the district court of Jefferson county, and on the 18th day of said month was, by the court sentenced to be hanged. From the judgment this appeal is prosecuted. The facts of the case, as far as it is necessary to treat them, are stated in the opinion.

On the 5th day of October, 1894, the defendant shot and killed C. W. West, in Silver Bow county. The case was thereafter transferred to the county of Jefferson, where it was tried, with the result above stated. The deceased was a railroad conductor, and at the time of the shooting was engaged in running a freight train on the Butte, Anaconda & Pacific Railroad, from Butte to Anaconda. The defendant and others had gotten on said train to ride to Anaconda, without authority, and against the consent of the deceased. The train was stopped, and the men put off. As the train started the defendant and others got on again. The train was again stopped by deceased, and defendant was ejected therefrom by him. Almost immediately after being ejected from the train the defendant fired two shots at the deceased, from a pistol, inflicting upon him two mortal wounds in the back. The defendant, immediately after firing the shots, ran from the place of the tragedy towards the foothills. He was immediately pursued by persons near by, and captured about a quarter of a mile away. To his captors he stated, in effect, that West hit him in the face, and then he shot him. The defendant sought to prove that this statement was made by him, after his capture, to the witnesses. The court held the testimony to be incompetent. The defendant assigns this ruling as error.

We do not think, as claimed by counsel for defendant, that these statements were part of the *res gestae*. They were part of the defendant's narrative of the events of the tragedy that was passed and complete. Nor were they free from the sus-

picion that they were made with the design of having them constitute a part of the plan of defense. (Wharton on Criminal Evidence, § 262; *Territory v. Clayton*, 8 Mont. 1.) Even admitting the ruling complained of to have been wrong, still we think the defendant was not prejudiced. One of the witnesses who assisted in defendant's capture testified, without objection, to this statement of the defendant. The evidence went to the jury, and was not stricken out. The objection to this testimony was made when another witness was on the stand, and held to be inadmissible. So that the defendant got the benefit of this testimony, whatever the benefit may have been.

The defendant also assigns as error the action of the court in excluding evidence of a statement made by deceased, a short time after the shooting, to the effect that defendant applied to him opprobrious epithets, and he struck him. We think this evidence comes within the same rule, and was subject to the same objection, stated above. But in this case one or more witnesses did testify to this statement of the deceased, and the evidence went to the jury, for what it was worth, without objection. Other witnesses were not permitted to testify to the same fact when objection was made. It does not appear from the record just what time had elapsed after the tragedy before the making of either of the above statements by the respective parties sought to be introduced in evidence, but it is clear that they were made after the tragedy was over and complete, and that they were narrations of events that had passed. We think, therefore, it cannot be claimed that such statements constituted any part of the *res gestae*.

The defendant contends that the evidence is not sufficient to sustain the verdict, because, he says, it does not show premeditation or deliberation.

Witness Pinney, who was the front brakeman on the train at the time of the homicide, after testifying to the attempt of the deceased to get the defendant off the car, and after testifying that it was his duty, as such brakeman, to pay strict attention to the deceased, and that he was doing so, in order to repeat whatever signals he might give to the engineer, swears:

“The party that the conductor was putting off got off on this southwest corner of the car, and Conductor West was standing over on the northwest corner of the car, with his hand up in about that position (illustrating); and as he had his hand up, giving the signal, I repeated the signal to the engineer, and before I had time to get my hand down there was a shot fired. I could not see the shot myself, but I could see the smoke and hear the report. As the shot was fired he seemed to wheel to the right, and as he was wheeling and falling the second shot was fired. I saw the smoke, and it came from the south of Conductor West. It seemed to come up over the car. Apparently, it would be about a foot or a foot and a half or two feet from the platform, from behind where West stood,—not exactly right behind, but a kind of sideways, and behind him, too, partly.”

Witness Vardell, who was the rear brakeman on the train at the time of the shooting, and who saw the entire transaction between the parties, testifies: “Conductor West gave a signal with his right hand to go ahead, and I saw the shot fired, and Conductor West turn a little bit sidewise, and fall on his hands. I was behind him, and I seen it from behind. Mr. West was facing towards the engine, and I was facing the engine; West had his back to me, and the smoke came from that corner (indicating). I saw him fall, and he was trying to help himself on the corner of the car, and the second shot was fired, and that came from the same direction as the first; and then I seen a man run from where the shot was fired.”

Witness Odgers, a miner working near the place of the tragedy, testifies as follows as to the shooting: “The man on the platform was sitting when I saw him first, and Mr. West was going towards him, simply walking. Mr. West did not appear to be doing anything with his hands, at all, but the minute he got close enough to the platform he got down to the platform; and the man that was sitting on the front of the platform slid off the platform, and got onto the ground. Mr. West did not knock him off, nor kick him off, nor did he use any force whatsoever to get him off; and, a moment or two

after,—I could not tell to a few seconds,—I heard the report of a gun, and saw smoke. I saw that smoke coming from the south side of the track,—the opposite side to me. It came from the side that the man got off. That man was Clay Pugh, the defendant in court here. And then I saw C. W. West climbing or falling across the car, to the opposite side, and he fell on the ground on the north side of the car. I saw him fall on the ground after the second shot. There was no time to spare between the shots. I could not see the man when he fired the shots. There could not be much of a flash, but I saw the smoke before it spread any. Judging from the smoke, the shots came from the track down between the cars.”

The testimony of the engineer and fireman of the train, and other witnesses, is to the same effect, as to what occurred between the parties at the time of the shooting.

The defendant's testimony as to what occurred at the time of the shooting, and the reason why he shot, is as follows: “As I was raising up, I saw the train was stopped, and I jumped off, and I started back. I had taken a step or so back, and he said, ‘Damn you! I will fix you.’ I turned around, and he threw his right hand to his hip pocket, and I drew my revolver, and shot twice. I shot because I thought he intended to shoot me.” The testimony of defendant is not corroborated by any witness in these particulars. And it will be noticed that the defendant does not claim that he fired the fatal shots in the heat of passion, aroused by blows or other mistreatment inflicted upon him by the deceased. His claim is that he shot twice because he thought deceased intended to shoot him. It is not contended that the court did not fully and fairly instruct the jury as to the law of the case, and that, before they could find the defendant guilty of murder in the first degree, they must believe from the evidence, beyond a reasonable doubt, that the killing was deliberate and premeditated. It was a matter for the jury to determine, under all the evidence, the degree of crime the defendant was guilty of, if any, under the instructions of the court defining the different degrees of homicide. If the defendant formed in his mind

the purpose to kill, any conceivable length of time before the killing, however short, and acted upon that purpose, then such killing was deliberate. This was an issue for the jury. We think there was ample evidence to justify the verdict.

The defendant assigns as error the action of the court in excluding from the jury the evidence taken before the coroner. This evidence was offered for the purpose of impeachment of the testimony of a number of the witnesses for the state. The evidence offered was in no way identified as the evidence of the witnesses given before the coroner. The defendant did not present this evidence to the witnesses sought to be impeached, to enable them to say whether it was their testimony given before the coroner. No one else testified that the evidence offered was the evidence of the witnesses given by them before the coroner. There was not even a certificate of the coroner to that effect. Nor has it been shown that, if the evidence offered had been admitted, it would have contradicted any witness as to any material matter in the case. We think the evidence was properly excluded.

After a careful consideration of the errors assigned, and of the entire record of the case, we are unable to discover any grounds for disturbing the result of the trial of this cause. The case seems to have been fairly tried upon the evidence and the law, and we are not prepared to say that the proper result has not been reached.

It appearing that the defendant has been granted a respite by the governor until the 1st day of July, 1895, pending the presentation and decision of this appeal, it is therefore ordered that the judgment of the court below be executed on that day, in accordance with the provisions of section 377 of the criminal practice act. Remittitur forthwith.

Affirmed.

DE WITT and HUNT, JJ., concur.

HEFFERLIN, RESPONDENT, v. CHAMBERS ET AL., COM-
MISSIONERS, APPELLANTS.

16	349
18	243
16	349
20	81

[Submitted July 2, 1895. Decided July 8, 1895.]

CONSTITUTIONAL LAW—*Contract in excess of constitutional limitation.*—A contract by county commissioners for the construction of a court house, the cost of which alone is to be less than ten thousand dollars, but which, together with the cost of ground, plans, and the hire of a supervising architect, greatly exceeds that sum, and which has not been authorized by any election, is within section 5, Article XIII, of the Constitution, prohibiting a county from incurring any indebtedness for any single purpose to an amount exceeding ten thousand dollars without the approval of the majority of the electors thereof.

Appeal from Sixth Judicial District, Park County.

INJUNCTION to restrain county commissioners from carrying out a contract. Judgment was rendered for the plaintiff below by HENRY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This action was brought by the respondent, a taxpayer of Park county, to restrain the defendants, the board of county commissioners of Park county, and H. J. Wolcott, from carrying out a contract entered into between the commissioners and said Wolcott, for the erection by the latter of a court house. The case was tried upon an agreed statement of facts. The judgment of the court perpetually enjoined the defendants from carrying out said contract, or paying any moneys to defendant Wolcott upon the same.

The ground for injunction relied upon by plaintiff was as follows: The contract with Wolcott was to erect the court house for \$9,680. The constitution of the state provides, in section 5 of article XIII, that "no county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars (\$10,000) without the approval of the majority of the electors thereof, voting at an election to be provided by law." Before the letting of the contract the commissioners had paid out \$3,200 for ground upon which to

build the court house, and \$700 for plans and specifications for the same, and further agreed to pay \$250 to an architect for supervising the construction. The sum of these items is \$13,830.

The plaintiff contends that the acts of the commissioners incurred an indebtedness for more than \$10,000, to wit, \$13,830, and that such indebtedness was proposed to be incurred without submitting the question to a vote of the electors. It appears by the statement of facts that the proposition had never been submitted to a vote. The district court adopted the views of the plaintiff, and rendered judgment as above noted, from which the defendants now appeal.

W. H. Poorman and H. J. Haskell, Attorney General, for Appellants.

Campbell & Stark, for Respondent.

DE WITT, J.—There is no question, in our mind, but the district court was right in its judgment. In fact, the proposition seems to be so simple that little remains to be said, beyond its statement. The constitution prohibits the incurring of an indebtedness or liability exceeding \$10,000, for a single purpose, without obtaining the approval of the electors at an election held for that purpose. It cannot be questioned but the commissioners in this case are undertaking to incur an indebtedness exceeding \$10,000 without the approval of the electors.

The only suggestion made against this view is that the indebtedness of \$3,200 and \$700 had been heretofore incurred, and that the indebtedness now proposed is only \$9,680, which, it is claimed, is within the limit, and therefore within the power of the commissioners. But such construction of the constitution would fritter away its plain intent. The constitution intended to limit the powers of the commissioners, as to an expenditure for a single purpose, to a certain figure, unless they obtained the approval of the people for such expenditure.

If we were to sustain the proposition of appellants in this case, it would be to allow county commissioners to expend more than \$10,000, or incur an indebtedness or liability exceeding that sum, if they simply resorted to the evasion of dividing the total amount into several sums, each less than \$10,000, and expending each of said several sums, or incurring each of said several liabilities, at different times. Under such construction they could expend \$9,999 in each of several successive years, and the total of said amounts all for one purpose. If they could do this in each of several successive years, why not in each of several successive months or days? It is clear that such conduct would be a gross violation of the constitutional provision, and that it was just such a violation as was contemplated by these appellants, and restrained by the district court.

The judgment of the district court is affirmed. Remittitur forthwith.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

NELSON, APPELLANT, v. SPEARS, RESPONDENT.

16	351
27	20

[Submitted July 2, 1896. Decided July 8, 1895.]

NEW TRIAL—*Parol evidence to vary written contract.*—It is error to admit parol evidence to vary the terms of a written contract, and, if admitted, the error is not corrected by an instruction to the jury to disregard it, if the verdict was in fact influenced thereby and a new trial should be granted notwithstanding such instruction. (*Fisher v. Brieoe*, 10 Mont. 124, cited.)

SAME—*Prejudicial error—Misleading instruction.*—The plaintiff sued the defendant to recover a sum claimed to be due for hay and other personal property sold by him to the defendant. The latter in his answer denied the indebtedness and set up a counterclaim. It appeared that the respective parties were copartners in the sheep business and that this copartnership continued to do business for nearly a year when it was dissolved by a written agreement entered into between the parties. The plaintiff in his replication to the defendant's counterclaim, alleged an agreement to pay the defendant \$40 per month as a herder from and after the date of the dissolution of said copartnership, but the court instructed the jury that the plaintiff's replication alleged that under the agreement of dissolution "the defendant was to receive \$40 per

month," from a date anterior to the partnership entered into between the parties. *Held*, that this instruction was a wrong interpretation of the plaintiff's replication, that it was misleading and therefore prejudicial to the plaintiff, and that a new trial should have been granted.

Appeal from Eighth Judicial District, Cascade County.

ACTION for goods sold. The defendant had judgment below. Plaintiff's motion for a new trial was denied by **BENTON, J.** Reversed.

A. J. Shores, for Appellant.

Leslie & Downing, for Respondent.

PEMBERTON, C. J.—Plaintiff sued the defendant in the district court to recover the sum of \$900, claimed to be due for hay and other personal property, sold by him to defendant. The answer denies the indebtedness, and sets up a counterclaim.

From the pleadings and evidence it appears that on the 21st of October, 1891, plaintiff and defendant, by written contract, entered into copartnership in the sheep business. At the date of this contract the plaintiff owned a large number of sheep, corrals, and lands, near Glasgow, in this state. This property was turned into the copartnership business, and became the property of the copartnership, by the terms of the articles of copartnership, the defendant giving his notes to plaintiff for a one-fourth interest therein. This copartnership continued to do business until the 22d day of September, 1892, when it was dissolved by the following written contract of the parties:

"This agreement, made this 22d day of September, 1892, by and between H. H. Nelson, of Cascade, in Cascade county, Montana, party of the first part, and More Spears, of Glasgow, state of Montana, party of the second part, witnesseth: That it is hereby mutually agreed that the partnership heretofore existing between said parties, in the sheep business, is dissolved by consent of both parties; that all contracts and agreements heretofore made by said parties, including notes and accounts, are hereby declared of no effect and void; that

all sheep, horses, implements, sheds, buildings, corrals, fences, and hay, and all other personal property of whatsoever description, having belonged or used in connection with the aforesaid business, and all parcels and pieces of land held by either party prior to said date, shall revert and belong to the party of the first part; for and in consideration of which said first party agrees to cancel all claims of whatever description, now held by first party against said second party. In witness whereof said parties have hereunto affixed their hand and seal the year and day aforesaid. H. H. Nelson. M. Spears."

This contract was acknowledged before a notary by the parties.

The defendant, in his answer, admits the making of this contract, but says that at the time the same was made the plaintiff agreed to pay him \$125 per month from the 21st day of October, 1891, until the 22d day of September, 1892, when the copartnership was dissolved, and as long thereafter as he should work for plaintiff. Defendant claims this was a part of the contract of dissolution of the copartnership, and in his answer says "that at the time of the making of the said new contract with plaintiff aforesaid, to wit, on the 22d September, 1892, aforesaid, the same was attempted to be reduced to writing, but by inadvertence, fraud, or mistake of the draftsman, and by mistake or inadvertence of said parties thereto, the same failed to state the terms of said contract, and did not express the intentions of said plaintiff and this defendant, in failing to show that plaintiff was to pay this defendant \$125 per month, from the — day of July, 1891, aforesaid, and thereafter, so long as defendant would work for plaintiff under said contract."

Defendant, as part of his counterclaim, alleges that plaintiff is indebted to him in the sum of \$650 for taking care of other sheep belonging to plaintiff at the rate of \$50 per month.

Plaintiff's replication denies the indebtedness contained in defendant's counterclaim, but says when the copartnership was dissolved on the 22d day of September, 1892, he employed defendant as a herder, for which services he agreed to pay him

\$40 per month, and paid him \$100 in advance, and that defendant worked for him under said contract until about the 10th of October, 1892.

The case was tried to a jury, who returned a verdict for the defendant in the sum of \$600. The plaintiff moved for a new trial, which was denied. From the order refusing a new trial this appeal is prosecuted.

The appellant assigns as error the action of the court in submitting to the jury the question of the indebtedness of the plaintiff to defendant for services prior to September 22, 1892, claiming that under the pleadings and evidence the jury should have been instructed to disregard the defendant's claim for such services. The evidence did not show any mistake, fraud, or inadvertence, as claimed by defendant, in making the contract of September 22, 1892. The court took this view of the matter, and instructed the jury that the evidence on the part of the defendant did not show that by inadvertence, fraud, or mistake anything had been omitted from said contract, and that defendant was not entitled to relief on that account. But evidence of the fact that plaintiff had agreed to pay the defendant \$125 per month, and that this was part of said contract, and was omitted therefrom, as claimed by defendant, had gone to the jury. This evidence tended plainly to contradict and change the terms of the written contract. It was error to admit it. (*Fisher v. Briscoe*, 10 Mont. 124; Comp. St. first div. § 628.) Its consideration should have been excluded from the jury. The court no doubt endeavored to do so by an instruction, but when it appeared that the jury did consider it, notwithstanding the instruction of the court, a new trial should have been granted. The counsel for the respondent certainly understood that the jury considered this evidence, for in their brief they say: "The jury, after considering the case, taking their verdict as a guide, allowed the plaintiff his claim, in full, of \$900, and also adopted the view of defendant that plaintiff contracted to allow him the \$125 per month, and allowed defendant \$1,587, less \$100 as a credit, with interest."

The appellant also assigns as error the giving of the following instruction: "Defendant further alleges an agreement in settlement of the affairs of the parties, and a new agreement whereby the partnership was dissolved, and an agreement made that defendant was to receive \$125 from July, 1891. This is denied, and the reply alleges that under the agreement defendant was to receive \$40 per month." In giving this instruction the court evidently misconstrued the allegations of plaintiff's replication. The replication alleges an agreement to pay defendant \$40 per month, as a herder; from and after September 22, 1892. There is no agreement contained in the replication to pay defendant \$40 per month from July, 1891. From this instruction it is fairly inferable that the replication alleged such an agreement. The instruction was calculated to mislead the jury, and was therefore prejudicial to the plaintiff. It is difficult to determine upon what theory the jury arrived at their verdict in this case. It is fair to presume that the verdict was not arrived at without considering evidence that was not admissible; and which tended to prejudice the plaintiff. Nor do we think that it may not be safely said that the jury were probably misled by the instruction complained of and treated above.

Under all the circumstances of the case, we think the motion of appellant for a new trial should have been granted. The order appealed from is reversed, and the cause remanded for new trial.

Reversed.

DE WITT and HUNT, JJ., concur.

HOPKINS, RESPONDENT, v. BUTTE AND MONTANA
COMMERCIAL COMPANY, APPELLANT.

[Submitted July 2, 1895. Decided July 8, 1895.]

WATERS—Damages from overflow—Negligence.—In an action for damages resulting from an overflow of the plaintiff's land, caused by a jam in negligently floating logs down a stream, it appeared from the testimony of the plaintiff that the jam extended partially across the stream and was throwing the water over the banks of the stream upon his land. He further testified that below the jam the water was within the banks and that the swales and sloughs below the jam were dry, and that ordinarily in high water these sloughs would fill up before the water went over the banks. He also testified that the defendant had only one man looking after the jams on the stream on the day in question and that the water stood over his ranch at the maximum depth for about thirty-six hours. It further appeared from the evidence that the water was high at the time of the jam, occasioned by an unusually heavy rain in the mountains; that the floating and rolling of the logs carried on the plaintiff's land was the cause of the injury complained of, and that in the following year the water was as high, but the defendant while driving his logs had men stationed along the drive to break the jams and no overflow occurred to the injury of ranchmen on the stream. *Held*, that the evidence was sufficient to sustain a finding that the plaintiff's land was flooded through the defendant's negligence. (*Hopkins v. Butte & Montana Com. Co.*, 18 Mont. 223, cited.)

SAME—Same—Measure of damages.—In an action for damages for injury to crops caused by the overflow of the plaintiff's land in negligently floating logs down a stream, the value of the crops, the expense of maturing them and of reaping, threshing and moving to market may be shown, in order to fix the amount of damages. (*Carron v. Wood*, 10 Mont. 500, cited.)

SAME—Same—Sufficiency of evidence to sustain finding.—In an action for damages resulting from the overflow of land, caused by negligently driving logs in a stream, evidence that a mare and colt were in the pasture when the overflow came; that the water was from two to fifteen feet deep and that nothing was again seen of the mare and colt, sufficiently warrants the finding that these animals were lost in the flood from the overflow.

SAME—Same—Competency of evidence.—In an action for overflowing land, resulting from the negligence of the defendant in driving logs whereby a log jam formed in a stream, evidence showing the method of operating adopted by the defendant in allowing jams to form and in breaking them by precipitating other jams upon them, instead of releasing them as they formed, is competent and admissible.

Appeal from Eighth Judicial District, Cascade County.

ACTION for damages for flooding land. Judgment was rendered for the plaintiff below by BENTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff recovered judgment for \$617 for damages caused by defendant flooding his land while driving logs on Deep creek. The defendant appeals from the judgment, and

from an order denying a new trial. The principal contention on the appeal is that the evidence did not sustain the verdict, in that it was not shown that the damages were occasioned by the negligence of the defendant. The defendant was engaged in driving about 5,000,000 feet of logs down Deep creek. The plaintiff was a ranchman, cultivating a crop upon his land lying along the creek. The creek overflowed, and the water covered the ranch to a depth of from two to fifteen feet, destroying growing grass, grain and potatoes, carrying away fences, and killing a mare and colt.

Plaintiff contends that the damages were caused by defendant's negligently managing its logs so that the same jammed and caused the water to overflow, scattering the logs and debris over the crop. The defendant's defense was that the damages were caused by reason of an extraordinary freshet, and not through its negligence.

A. J. Shores, for Appellant.

Leslie & Downing, for Respondent.

DE WITT, J.—We are of opinion that there is no question in this case that the damages complained of by plaintiff occurred, and that his loss was fully equal to the amount which the jury found.

The only substantial question in the case is whether the evidence of the defendant's negligence appears to be sufficient to sustain the verdict found by the jury and upheld by the court in denying the motion for new trial. It seems to be true that the high water was occasioned by an unusually heavy rain in the mountains. In the afternoon of July 12, 1891, the plaintiff heard an unusual noise at the mouth of a slough at the upper end of his ranch. Upon examination he found a log jam had formed at that point. It is true that he admitted that he could not see whether the jam extended across the whole width of the stream. But he testified clearly that there was a jam at that point, and that the jam was throwing the water over the banks of the creek upon his land. He testi-

fied further that below the jam the water was within the banks, and that the swales and sloughs below the jam were dry, and that ordinarily in high water these sloughs would fill up before the water went over the banks. The plaintiff did not know when this jam went out. It may have been on Sunday night. He does not know whether the jam was there Monday. The water stood over his ranch at the maximum depth, the witness thinks, for about 36 hours. It also appears by the testimony of plaintiff that the defendant had only one man looking after the jams on the stream on that Sunday. This man had gone up the stream on Sunday morning, and released a jam near another ranch above plaintiff. This released jam ran down upon the jam at plaintiff's ranch.

Another witness testified for plaintiff that he had had considerable experience in log driving, and that one man was not sufficient to look after the jams in a drive of logs twelve miles long and containing 5,000,000 feet.

It appeared that the defendant had a considerable force of men—some thirty-five or forty—working on the drive, but that these men were at the rear end of the drive, and that they were engaged in breaking jams at the rear end, and that the jams so broken would run down upon the lower jams, sometimes breaking through them, and sometimes temporarily making the jams greater, and backing up the water to a greater extent. It was in testimony that men should have been stationed throughout the length of the drive to break jams as they occurred, and thus release the accumulated water. It also appears that in the following year—1892—the water was nearly, if not quite, as high as in 1891, but that in the second year the defendant, while driving its logs, had men stationed along the drive to break the jams, and by this method of operation the damages which occurred to the ranchmen in 1891 were not repeated in 1892. It thus appears that by a different method of operation the defendant, in 1892, was able to avoid a repetition of the damages which occurred the year previous.

The defendant introduced testimony that it had five men along the creek, and that the object of having them there was

to prevent jams which were likely to occur if there was no one to look after them. But this witness does not know what the drivers were doing on the day when the damages occurred. It also appeared that the water stood upon the plaintiff's ranch, at the maximum height, for about 36 hours. This, it was claimed, indicated that the flooding occurred by the natural rise of the water, and not by the jam.

This case was before us for consideration in 13 Mont. 223. The case was then sent back for a new trial, for the reason that the court, in its instructions, had ignored the question of negligence, and had, in effect, instructed the jury that they might find for the plaintiff, regardless of the defendant's negligence. This error was cured on the second trial, and the jury were instructed in this matter. We are of opinion that the evidence was sufficient to sustain the jury in finding the negligence of defendant.

There is some room to argue that the evidence shows that the flooding would have occurred by reason of the unusually high water, without regard to the log jams. But there is also evidence that the jams, and the floating and rolling of the logs over the crops, was the cause of the damages. It was the province of the jury to decide these questions of fact, and we are of opinion that they had sufficient evidence upon which to base their conclusion. The fact which we consider significant is that in the succeeding season, when the water was apparently as high as in 1891, damages were prevented by reason of the defendant's adopting the very simple precautions which plaintiff claims it neglected in the year 1891.

It is also contended that the court erred in allowing certain testimony as to the measure of damages. We think, however, that the case was tried upon the lines laid down in the case of *Carron v. Wood*, 10 Mont. 500. The value of the crops was shown, and also the expense of maturing them, and of reaping and threshing, and moving to market.

It is also contended that the evidence was not sufficient to show that the mare and colt were lost by the negligence of the defendant. We have determined that the evidence was suf-

sufficient to sustain the jury in finding that the flooding occurred through the negligence of the defendant. It further appears that the mare and colt were in the pasture when the flood came; that the water was from 2 to 15 feet deep; that nothing was again seen of the mare and colt. We think this evidence is quite sufficient to show that these animals suffered from the same disaster that destroyed the fences and crops.

The court allowed the plaintiff to prove the forming of certain other jams in the drive above plaintiff's ranch. This was objected to as incompetent. Plaintiff wished to show by this testimony what the action of the water was when retained by a log jam. We think this evidence was not objectionable when it is also considered that these other jams were in the same drive of logs. They showed the method of operating adopted by the defendant in allowing jams to form, and in breaking them by precipitating other jams upon them, instead of releasing them as they formed. The judgment and order denying the new trial are affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE, RESPONDENT, v. BRETT, APPELLANT.

[Submitted June 25, 1895. Decided July 8, 1895.]

CRIMINAL LAW—Prosecution by information.—Section 2, Article III, of the state constitution, provides for the prosecution of criminal actions by information "after examination and commitment by a magistrate, or after leave granted by the court," and under this provision an information may be filed after leave has been granted by the court, without an examination and commitment by a magistrate. Either there must have been an examination and commitment, or leave of court procured, but both steps are not required.

SAME—Same—Constitutional law.—The proceeding authorized by section 2, Article III, of the state constitution, allowing prosecution by information with leave of court, without preliminary examination having been had, is not a deprivation of the liberty of the citizen without due process of law and does not abridge the privileges and immunities of any citizen as guaranteed by the fourteenth amendment of the constitution of the United States.

SAME—Forgery of city warrant.—A city warrant or order, regular on its face, and apparently drawn according to law on the city treasurer, signed by the mayor and countersigned by the city clerk, for the payment of moneys out of a specific fund, is a

16	360
16	360
21	136
16	360
123	427
16	360
29	376
16	360
37	95

draft, and is therefore the subject of forgery under section 96, Fourth Division of the Compiled Statutes, making it forgery to "falsely make, alter, forge or counterfeit any writing obligatory, draft, etc."

SAME—Same.—Where a city warrant purporting on its face to be good and valid for the purposes for which it was made, is altered with the intent to defraud, the crime of forgery is complete. (*State v. Vineyard, ante*, page 138.)

SAME—Same—*Ultra vires defense*.—On a prosecution for forgery of a city warrant, it is no defense that the city had exceeded the constitutional limit of its indebtedness at the time the warrant in question was issued.

Appeal from First Judicial District, Lewis and Clarke County.

CONVICTION for forgery. The defendant was tried before BLAKE, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Defendant appeals from a conviction of forgery. The information charged that the defendant "having then and there in his possession a certain writing and warrant of the city of Helena for the payment of money, of the tenor following, to wit:

"\$7.50. Helena, Montana, Oct. 1, 1894.

"The treasurer of the city of Helena, Montana, will pay to the order of H. Mitchell seven 50-100 dollars for labor, out of any moneys in the treasury belonging to the street fund.

"Elbert D. Weed, Mayor. —

"Stephen Carpenter, City Clerk.

"No. 19,608.

"Presented and registered, and not paid, for want of funds,

"Oct. 29, 1894.

"C. B. GARRETT, R., City Treasurer.

"H. MITCHELL."

—"Then and there falsely, fraudulently, and feloniously altered and raised the same by adding to the word 'seven,' in the body of said warrant, the letters 'ty,' and by falsely, fraudulently, and feloniously adding to the figure '7,' where the said figure appears in the body of said warrant, the figure

'0,' so that said warrant became, and then and there was, of the tenor following, to wit:

"\$70.50.

Helena, Montana, Oct. 1, 1894.

"The treasurer of the city of Helena, Montana, will pay to the order of H. Mitchell seventy 50-100 dollars for labor, out of any moneys in the treasury belonging to the street fund.

Elbert D. Weed, Mayor.

"Stephen Carpenter, City Clerk.

"No. 19,608.

"Presented and registered, and not paid, for want of funds.

"Oct. 29, 1894.

"C. B. GARRETT, R., City Treasurer.

"H. MITCHELL."

—"With intent to injure and defraud the said city of Helena, which said city of Helena," etc.

The defendant filed a motion to quash the information, because "he was not legally committed, and is not legally held, in this: That the said informations do not charge the defendant with the offense for which he was held to answer, or any other offense disclosed before the committing magistrate, said defendant being charged by complaint before the committing magistrate for forging an order for the payment of moneys of the city of Helena to one J. Patrick, and the offense disclosed at such hearing relates to such offense alone, and no charge was made of facts disclosed at such hearing in regard to the offense charged in said informations, or either of them, nor was he held therefor." The court overruled the motion. The defendant then filed a demurrer, the principal grounds of which were that the instrument charged to have been forged is a city warrant, which is not made the subject of forgery, under the statutes; that the instrument charged to be forged is wholly void, in that the indebtedness of the city of Helena, as limited by the constitution and laws of the state, was exceeded by many thousand dollars at the time that the forgery is charged to have been committed. The demurrer was overruled. A trial was had. The state introduced its proof.

Thereupon the defendant offered to prove "that the outstanding and unpaid bonds of the city of Helena, October 1, 1894, amounted to the sum of \$391,000; that the outstanding and unpaid warrants and floating indebtedness of said city of Helena, issued, registered, and unpaid, before the warrant charged to be forged by the defendant in said information, amounted to the sum of \$311,135, making a total of \$702,135 indebtedness of the said city of Helena; that the last assessment and valuation of property of said city of Helena in the year 1894, duly made by the regularly elected assessor of said city, amounted to the sum of \$13,500,000; that three per cent. of said valuation and assessment, as limited by the constitution, is \$405,000; that the warrant charged to be forged in the information is void by the constitution, and utterly worthless for all purposes, and hence not a subject of forgery." This evidence was objected to, on the ground that it did not constitute a defense, and was immaterial and irrelevant. The court sustained the objection of the state.

After conviction, a motion in arrest of judgment was made, because the court had no jurisdiction to try the case, because the information was not based upon the offense charged in the complaint before the committing magistrate, nor the evidence disclosed before said magistrate, nor on the commitment; also because the facts stated in the information did not constitute a public offense. The motion was overruled.

C. W. Wiley, for Appellant.

Henri J. Haskell, Attorney General, for the State, Respondent.

HUNT, J.—It appears by the record that the information upon which the defendant was convicted of the crime of forgery was filed by leave of court. Nevertheless, it is argued, a prosecution by information, where there has been no preliminary examination, is illegal, and a violation of constitutional rights. Const., art. III, § 8, expressly provides that "all criminal actions in the district court, except those on appeal, shall be

prosecuted by information, after examination and commitment by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment, without such examination or commitment, or without leave of court." It is evident that one of the objects of the constitution was to do away, to a great extent, with the machinery and expense of a grand jury, by substituting therefor prosecution by information. It is not necessary, in order to vest power in the county attorney, to file an information that there shall be a preliminary examination and commitment. He may act, after leave has been granted by the court, in a case like the one at bar, where there may not have been any charge or information before a committing magistrate.

One of two methods of procedure is indispensable where an information is filed,—either there must have been an examination and commitment, or there must have been leave of court procured. But both steps are not required. A plain interpretation of the words of the constitution by which every clause of the section quoted shall be effective leads to this conclusion. We think, too, that the rights of a defendant are guarded, no matter what procedure is followed.

1. Where an investigation into his guilt or innocence is had before a committing magistrate, and a commitment is the result, such a judicial inquiry is sufficient to justify the county attorney in proceeding in the district court without first obtaining leave of that court to file an information, formally charging the defendant with the offense for which he was examined, or any other offense, by the facts disclosed upon such preliminary hearing. The protection rests in the guaranty of a right to a judicial review of the matter by an impartial magistrate.

2. Where no examination has been had before a magistrate, and no commitment has been made, in such case, to protect the rights of the defendant, and to guard him against oppression or malice, and to prevent abuse of any general power vested in the county attorney, leave of the district court is necessary to be obtained. Thus, again, there is the guaranty that a judicial order will be required before there can even be a

charge preferred. It is suggested that obtaining of a leave of the court is a mere perfunctory matter, and is granted of course. This argument, if true, reflects credit upon the several county attorneys of the state for having administered their offices with that high sense of impartial responsibility and power imposed upon them by the constitution, but it loses its entire force if an instance should arise where a prosecuting officer oppressively, maliciously or otherwise illegally should attempt to unjustly harass any citizen by filing an information charging him with crime. At once, upon proper showing, or doubtless by order of the court of its own motion, where the court should believe that a wrong was about to be done, the leave of the court would be suspended or denied, until an inquiry could be had into the reasons for the official acts of the county attorney in filing the information, and until the court was satisfied by the showing made that the case was one where an information should be filed. Thus, again, the guaranty that judicial leave will be had before instituting a prosecution affords safety to the innocent, quite ample to prevent any abuse of the power of the state, in the hands of a prosecuting attorney. See *State v. Boswell*, 104 Ind. 541, 4 N. E. 675.

3. Where a grand jury investigates crime, they may act independently of any preliminary charge, or without the permission of the court. The formality of the organization of a grand jury, its well-tested utility as an institution of the law, its intelligence, its numbers, and its presumed impartiality, themselves are deemed sufficient assurances that the jurors will abide by their oaths under the law to present no indictment "through hatred, malice or ill will, nor leave any unrepresented through fear, favor or affection, or for any reward, or the promise or hope thereof." For these reasons, doubtless, the constitution has vested this power of indictment in the grand jury, and saw fit not to restrict their jurisdiction by any limitations other than those usually governing the conduct of such a body.

We are cited by appellant to several cases in California, Kansas and Michigan, but none of those decisions are applica-

ble, because the provisions of the constitutions and statutes of those states either limit the right to file an information to cases where there has been an examination and commitment by a magistrate, or expressly prohibit that method of prosecution, unless there has been such examination and commitment.

In California, by section 8, article I, of the constitution, offenses shall be prosecuted by information after examination and commitment; and by section 995 of the Code of Criminal Procedure of California, an information shall be set aside if, before the filing thereof, the defendant has not been legally committed by a magistrate. (*People v. Christian*, 101 Cal. 471, 35 Pac. 1043.) Procedure like that of Montana, after obtaining leave of court, is not known to that state; and it is well to note that the annotations to sections 1730 and 1910 of the Penal Code now in force are not made with relation to the proper effect to be given to the authorization in the constitution of Montana permitting informations to be filed where leave of court has been obtained, without regard to whether there has been any preliminary examination before a magistrate.

In Kansas, it is also expressly provided by statute (paragraph 5133, Gen. St. 1889) that "no information shall be filed against any person for any felony until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, unless such person shall waive his right to such examination," etc.

In Michigan, it is provided by section 9555, page 2299, How. Ann. St., that no information shall be filed until there has been a preliminary examination, unless such person shall waive his right to such examination. (*People v. Evans*, 72 Mich. 367, 40 N. W. 473.)

Appellant raises the additional point that even if the constitution of the state does authorize prosecution by information without preliminary examination having been had, where leave of court is first obtained, such a proceeding is a deprivation of the liberty of the citizen, without due process of law, and is an infringement abridging the privileges and immunities of

citizens of the United States, as guaranteed by the fourteenth article of the amendment of the constitution of the United States.

The supreme court of the United States, in *Hurtado v. People*, 110 U. S. 534, 4 Sup. Ct. 111, 292, affirmed the doctrine laid down in the earlier case of *Davidson v. New Orleans*, 96 U. S. 97, that "it is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." "In the fourteenth amendment," speak the court, "by parity of reason due process of law refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." "It follows that any legal proceeding, enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." And, again, the same court, in *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, decided that a statute of New Jersey conferring upon one charged with crime the right to waive a trial by jury, and to elect to be tried by the court, and conferring power upon the court to try the accused in such case, is not in conflict with the constitution of the United States. Justice Shiras approvingly quotes from a former decision of Justice Bradley in *Missouri v. Lewis*, 101 U. S. 22, as follows: "There is nothing in the constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties,

and the common law and its methods of procedure for the rest of the state, there is nothing in the constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the fourteenth amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to; for, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states, separated only by an imaginary line. *On one side of this line there may, be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceedings.* * * * Where a part of the state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. * * * It would be an unfortunate restriction of the powers of a state government if it could not, in its discretion, provide for these exigencies.”

Guided by the discussions and logical reasoning of such constitutional expounders as Justices Miller and Bradley, we are of the opinion that, by the clause under discussion, the framers of the constitution of the state formulated a somewhat new and presumably improved procedure in criminal cases, limited, but general in its application; always circumscribed in its operation by depending upon the sound approval of a court before its power may be legally invoked to charge a citizen with crime who has never had the opportunity of a hearing before a committing magistrate, or whose conduct has not been investigated by a grand jury. We are therefore unable to see how

the proceeding authorized by the constitution in any way interfered with the administration of the regular course of law. Leave of court being necessary, the individual is not subjected to any arbitrary exercise of the powers of the state not restrained "by the established principles of private right and distributive justice." (*Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577; *Caldwell v. Texas*, 137 U. S. 692.)

In *State v. Sureties of Krohne* (Wyo.) 34 Pac. 3, Groesbeck, C. J., in a learned opinion, analyzes a former statute of that state, which authorized a prosecuting officer, without any authority of the court first being obtained, to file an information, and comes to the conclusion that, although the provision was an extreme one, yet it did not conflict with the constitutional safeguards thrown about every citizen of the state. It is unnecessary for this court to pass upon such a statute, or an equally liberal statute to be found in the state of Washington, and criticised by Judge Handford in *Re Humason*, 46 Fed. 388, or the laws of other states which permit informations to be filed without the leave of court first obtained. See, on this point, *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635, and cases cited in the opinion of Groesbeck, C. J., *supra*. It would seem, too, that there is much more room for argument against the validity of a statute where the county attorney may proceed without leave of court than where such leave is a prerequisite to filing an information. But if, as is held in several of the decisions cited, there is no infringement upon rights where no leave is required, and no examination need be had, *a fortiori* can it be said that none are denied where a court must exercise a control over the action of the county attorney.

The point that a city warrant is not the subject of forgery is not well taken. The statute makes it forgery to "falsely make, alter, forge, or counterfeit any * * * writing obligatory, draft, * * * contract," etc. (Comp. St. div. 4, c. 7. § 96.) A city warrant or order, regular on its face, and apparently drawn according to law on the city treasurer, signed by the mayor of the city, and countersigned by

the city clerk, for the payment of moneys out of a specific fund, is a draft. (Daniel, Neg. Inst. §§ 427, 428.) It is therefore made the subject of forgery by the statute quoted.

The warrant is not illegal upon its face. On the contrary, it purported to be good and valid for the purposes for which it was made. On its face it would have the effect to defraud those who might act upon it as genuine. Therefore, if it was altered with intent to defraud on the part of the defendant, the crime of forgery was complete. (*People v. Bibby*, 91 Cal. 470; *State v. Vineyard*, ante page 138; 2 Bish. Cr. Law, §§ 523, 533.)

Appellant finally argues that he ought to have been permitted to prove that the warrant was void, because the city of Helena had exceeded the constitutional limit of its indebtedness at the time the draft in question was issued. This argument is well answered by the observations of the supreme court of California in *People v. Munroe*, 100 Cal. 664. In that case the defendant was convicted of forgery. The writing was an assignment of the unearned salary of a public school teacher for the next ensuing month, together with an order on the city auditor of Los Angeles for the warrant representing such salary. It was claimed that the purported author of the writing, being a public school teacher, was a public officer, and that the sale or assignment of an unearned salary by a public officer was void, being against public policy, and, the writing being void, it could not be the basis of a charge of forgery. The court held that the writing was the subject of forgery, and, in discussing obligations *ultra vires*, said: "Obligations *ultra vires* stand upon the same level with contracts against public policy as to the offense of forgery. If one is not the subject of forgery, neither is the other. In England, corporations are created by special acts of parliament. Within those acts are found the measures of their powers. In this country, the general statutes, in connection with the articles of incorporation, which are public records, form the limitation of their powers. Thus, the world deals with corporations with a knowledge of the extent of their powers, and ignorance of

the law forms no defense to the plea of *ultra vires*. If this appellant's position be sound, all contracts of corporations which are *ultra vires* are not the subject of forgery. Neither would bonds of municipal corporations which are *ultra vires* form the foundation for a prosecution for forgery. The determination of the powers of corporations, both private and municipal, is a question often involving the most complex principles of legal jurisprudence; and, if *ultra vires* contracts may not be forged, a rich field for the successful practice of fraud is presented to the forger. In *State v. Eades*, 68 Mo. 150, 30 Am. Rep. 780, it is said that the fraudulent making of a false municipal certificate of indebtedness is forgery, though the municipality had no power to issue such certificate; and this principle is in line with sound reason, and fully commends itself to our views. It is held that contracts made under an unconstitutional law are void. Every man is presumed to know the law, and appellant's contention would free the criminal forging such a contract. (*Vilhac v. Railroad Co.*, 53 Cal. 208.) In other words, it would be a good defense to a prosecution for forgery that the law under which a genuine contract similar to the forged one might be made is unconstitutional. Such a plea is too remote from the crime of which the accused stands charged, and his liberty must be regained on more substantial grounds. As to what contracts are against public policy, or *ultra vires*, or void as creations under unconstitutional statutes, we think matters entirely foreign to a prosecution for forgery. In the examination of such grave and abstruse questions, the criminal element of the case would soon be lost to view."

We find no error in the case. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

ATKINSON ET AL., APPELLANTS, v. CITY OF GREAT FALLS ET AL., RESPONDENTS.

[Submitted June 25, 1895. Decided July 8, 1895.]

MUNICIPAL INDEBTEDNESS—Constitutional limit—Evidence of liability—Injunction.

In the case at bar, the plaintiffs sought to restrain a city from carrying out a contract for the paving of a street on the ground that it would create such an increased indebtedness of the city as is prohibited by section 6, Article XIII, of the state constitution. The defendants in their answer alleged that the cost of paving under the contract was payable out of a specific fund assessed against the land abutting on the street to be paved and did not constitute an indebtedness or liability of the city. *Held*, that it was incumbent upon the defendants to show that proper steps had been taken to assess the abutting property with the cost of the improvement, and that the contractor had expressly agreed to accept the fund thus raised by such special assessment and expressly waived all right to hold the city in any way liable under the contract in question.

Appeal from Eighth Judicial District, Cascade County.

INJUNCTION to restrain the carrying out of a street paving contract. Defendants' motion for a nonsuit was sustained by BENTON, J. Reversed.

Ransom Cooper, for Appellant.

Largent & Huntoon and Samuel Stephenson, for Respondents.

PEMBERTON, C. J.—This is an action for an injunction to restrain the defendants, the city of Great Falls and Henry Vogel, from carrying out a contract entered into between them for the paving of a street in said city. The contract price for the paving is \$43,000. The main ground upon which the injunction is sought is that the carrying out of this contract will increase the indebtedness of the city beyond the constitutional limitation of 3 per centum of the taxable property in said city as shown by the last assessment thereof. (Section 6, art. XIII, of the Constitution.) The complaint alleges that the contract sought to be enjoined is in violation of said section, and is therefore void. The answer denies the facts stated in

the complaint, and alleges that the cost of paving said street in accordance with the resolutions of the city council of said city and the terms of the contract entered into between said city and Vogel is assessed to the abutting owners on said street, except the sum of \$12,000, being the cost of paving the intersections and crossings of the street to be paved, and that the warrants to be drawn by said city in payment of such paving are to be drawn on a "special fund," assessed against the property abutting on the street to be paved, except for the sum of \$12,000 for paving the intersections and crossing of said street, which sum is to be paid out of the general fund of the city. The answer denies that the city, by incurring this indebtedness, will exceed the constitutional limitation of indebtedness as alleged in the complaint. At the conclusion of the testimony on the part of the plaintiffs the court sustained a motion by the defendants for a nonsuit, on the ground that there was no evidence to support the allegations of the complaint, and entered judgment dismissing plaintiffs' complaint, and for costs. From this judgment the plaintiffs appeal.

The evidence of the city clerk is substantially to the effect that at the time the contract in question was entered into the city was indebted in the sum of \$236,256.35; that the city had in cash in all its funds \$35,676.25; that \$20,859.92 were locked up in the suspended and insolvent Merchants' National Bank, and not available, except a 10 per cent. dividend on said sum, which had been paid; that there was due the city at the date of the contract the sum of \$15,640.73 from property benefited by special improvements; that on August 20, 1894, the city council awarded the contract in question to defendant Vogel. The county clerk and recorder of the county testified that the county board of equalization completed its work of equalizing the assessment roll of the county for the year 1894 on the 19th day of August of that year; that on the 22d day of August thereafter the board was in receipt of a letter from the state board of equalization, directing that the assessment of certain personal property should be raised 10 per cent. by the county board. But when the county board made such raise or

increase in the assessment of this personal property does not appear. It is agreed that the assessment of taxable property for state and county taxes within the city of Great Falls for the year 1893 was \$7,500,000, and for the year 1894, \$6,000,000.

It is contended that the evidence of the city clerk should not have been admitted, because it was not the best evidence of the matters in relation to which he testified, in that he did not introduce the books of the city, showing the city's indebtedness. It is true that in his testimony he gave estimates, and assumed to approximate the indebtedness of the city in some instances. But he testified from memoranda, evidently prepared by himself from the books kept by him as clerk of the city. Nor does it appear that the production of the books was demanded, or that any specific objection was made to his testifying from memoranda made by him therefrom. While this evidence is not as clear and exact as it should have been, especially in a case involving such grave questions of law and fact, and while we cannot but condemn the looseness characterizing the introduction of the evidence, yet we think there was evidence substantially tending to prove the allegation of the complaint that the city, by entering into the contract in question, exceeded its constitutional limitation of indebtedness.

The defendants claim in their answer that the sums due the city from property benefited by special improvements are resources of the city, and in no manner constitute an indebtedness or liability of the city. They claim that \$31,000 of the contract price of the paving of the street in question will not become an indebtedness of the city, as the same is to be paid out of a special fund assessed upon the property abutting upon the street to be paved. We think there was such a showing made by the evidence as to the amount of the city's indebtedness as to require the defendants to prove these allegations by showing that the warrants or other obligations drawn and to be drawn by the city on these special funds are so specific and unequivocal in their terms as to fix the liability for the payment thereof on such special funds, and leave no question that

the city is in no way liable therefor. This can only be properly done by putting these warrants or other obligations in evidence, so that the court may determine, from an inspection thereof, whether the special funds are solely liable for the payment thereof, or whether or not they constitute an indebtedness of the city. A determination of this question is necessary in ascertaining whether the city has exceeded the indebtedness it may incur under the constitution.

It would seem that, if the city has taken the proper steps under the law to assess the property abutting on the street intended to be paved, under the contract in question, with the cost of the improvement, and if, in entering into the contract, it has expressly and clearly excepted and protected itself from any liability thereunder for such cost, and the liability created by such contract is confined and restricted to the special fund created by the special assessment upon the property abutting on the street to be paved, and the contractor has expressly agreed to accept the fund raised by said special assessment, and has expressly waived all right to hold the city in any wise responsible or liable for the cost of the paving of said street, then such contract would not create such an indebtedness of the city as is prohibited by section 6, art. XIII, of the constitution of the state. (*United States v. Ft. Scott*, 99 U. S. 152; *Fowler v. City of Superior* (Wis.), 54 N. W 800; *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462; *Dill. Mun. Corp.* (4th Ed.) § 135.)

It is possible that, after a very full examination of the authorities bearing upon the question involved in this suit, a determination could be reached upon the record before us, but, as the briefs and arguments of counsel are almost wholly directed towards the single issue of what was the indebtedness of the city at the date of the contract in question, and as it is important that a decision on the motion for nonsuit be made without delay, we prefer to reserve any decision on legal questions until the facts are more clearly before us, and until argument may be had on such other points as are probably involved when the facts are finally determined.

The judgment is reversed, and the cause remanded for new trial, and the district court is advised to issue a restraining order until the cause is finally determined.

Reversed.

DE WITT and HUNT, JJ., concur.

QUAINTANCE, RESPONDENT, v. GOODROW ET AL., APPELLANTS.

[Submitted July 8, 1895. Decided July 15, 1895.]

PROMISSORY NOTE—Indorser—Waiver of notice of non-payment.—Notice of demand and non-payment is waived by the indorser of a note who, at the time of indorsing it, stated to the payee that he was to look to him and to no one else to pay the note and that he would pay it promptly, and on the last day of grace and at other times after maturity promised to pay it and asked not to be pressed.

Appeal from Fifth Judicial District, Jefferson County.

ACTION on a promissory note. Plaintiff had judgment below. Motion of defendant King for a new trial was denied by SHOWERS, J. Affirmed.

Walsh & Newman and W. L. Hay, for Appellant.

Cowan & Parker, for Respondent.

PEMBERTON, C. J.—This is an action on a promissory note. On the 17th day of June, 1892, Moses Goodrow executed his promissory note to plaintiff for the sum of \$750, with interest payable six months after date. Defendant King indorsed the note at the date of its execution. The note was not paid at maturity, and this suit was brought for its collection.

The defendant King alleges as a defense that the plaintiff did not demand the payment of the note, at maturity, of the maker; that the note was not protested for nonpayment; and that he was not in any manner notified of the nonpayment

thereof. The complaint alleges, in effect, that defendant King, by divers promises made to pay the note, before, at, and subsequent to the maturity thereof, waived protest, presentation, and notice of nonpayment. The case was tried to the court without a jury. The court found, as questions of fact, that defendant King, at the time he indorsed the note, stated to plaintiff that he was to look to him (King), and no one else, to pay the note, and that he would pay it promptly; that, on the third day of grace, the agent of plaintiff demanded of King payment of said note, and that he promised then, and at various times thereafter, to pay the same. The court rendered judgment against King for the full amount of the note. King appeals from the judgment, and also from the order denying a new trial.

The testimony of the witnesses is to the effect that the defendant King, at divers times after the maturity of the note, promised to pay it. He asked not to be pressed, and promised that, as soon as he could get the money, or arrange it, he would pay the note. He promised to pay it on the last day of grace, and asked not to be pressed. We think the evidence amply supports the findings of the court in respect to this contention.

Daniel, in his work on Negotiable Instruments (4th Ed. § 1090) says: "When presentment of the bill or note at maturity has been dispensed with by prior agreement between the parties, or, in other words, has been waived by the party entitled to require it, the holder is excused for his failure to make it. It would be fraud upon the holder to permit him to suffer by acting upon the assurance of the party to whom he looks as security upon the paper; and, as a prompt presentment is a requirement solely for the benefit of the drawer and indorsers, they are themselves the sole judges to determine whether or not they will enforce it. The waiver may be either verbally or in writing. It may be expressed *in totidem verbis*, or inferred from the words or acts of the parties. And it matters not what particular language may be used, so that it conveys the idea that the presentment at maturity is dis-

pensed with. The like observations apply to the protest and notice." It is not necessary that the waiver should be direct and positive. (Daniel, Neg. Inst. § 1091. See §§ 1090-1108, inclusive, for a general discussion of the doctrine of waiver.)

In *Yeager v. Farwell*, 13 Wall 6, a case involving the question of waiver, the court say: "The indorser can, by his own conduct, place himself in such a position that he is estopped from alleging want of demand and notice of nonpayment. Although, accurately speaking, there can only be a waiver of demand and notice by the indorser before the note is due, yet, after it is due, he can waive proof of them, or, what is more to the purpose, he can so act towards the holder of the note as to render the fact that demand was not made or notice given wholly immaterial."

In *Gove v. Vining*, 7 Metc. (Mass.) 212, a case almost identical in its facts with the case at bar, Mr. Chief Justice Shaw says: "And the court are of opinion that when an indorser, at or shortly before the time when the note becomes due, says to the holder that an arrangement for its payment is about being made, and in direct terms, or by reasonable implication, requests the holder to wait, or give time, it amounts to an assurance that the note will be paid,—that the promisor or indorser will pay it,—and is a waiver of demand and notice. It tends to put the holder off his guard, and induces him to forego making a demand at the proper time and place; and it would be contrary to good faith to set up such want of demand and notice—caused perhaps by such forbearance—as a ground of defence." See, also, authorities cited. (*Markland v. McDaniel*, (Kan. Sup.) 32 Pac. 1114; *Sheldon v. Horton*, 53 Barb. 23.)

We are of the opinion that the defendant King, by his conduct and frequent promises to pay the note, waived demand and notice of nonpayment thereof.

The judgment and order appealed from are affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

KIMPTON, APPELLANT, v. THE JUBILEE PLACER
MINING COMPANY ET AL., RESPONDENTS.

[Submitted July 9, 1895. Decided July 15, 1895.]

16	379
17	143
18	379
22	108
16	379
24	115
16	379
81	83
16	379
34	493

SPECIAL FINDINGS—General verdict.—Special findings control the judgment even if the general verdict is contrary thereto.

SAME—Water rights—Priority.—In an action to determine priority to the use of the waters of a stream it is error to render judgment for the defendants for costs where it appeared from the special findings that while plaintiff and defendants derived title, with the water appurtenant, from a common grantor, plaintiff's deed was executed and recorded long prior to defendants'; that at the time of defendants' purchase plaintiff had a ditch carrying 200 inches which he used during the irrigating season; that 160 inches were necessary to properly irrigate plaintiff's ranch; that the water was conducted upon the land at the time of plaintiff's purchase and he had continued to use it; that defendants had not used the water in question for any beneficial purpose for five consecutive years before the commencement of the action,—since the findings warranted a judgment only for the plaintiff.

APPEAL—New trial.—Where the error of the court upon which a reversal is ordered did not occur during the trial but arose in rendering a wrong judgment upon the facts as found and undisputed, a new trial is not necessary but the case will be remanded for the entry of a proper judgment. (*Woolman v. Garringer*, 2 Mont. 405; *Collier v. Irvine*, Id. 557; *Barkley v. Telleke*, Id. 435; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 553; *Stackpole v. Hallahan*, ante, page 40, cited.)

APPEAL—Rehearing.—Where, after a rehearing had been ordered, it appeared that the time for the same had expired and that the remittitur had been sent to the district court and judgment entered thereon, the supreme court will decline to rehear the appeal in the absence of fraud, mistake or inadvertence in issuing the remittitur.

Appeal from Fifth Judicial District, Jefferson County.

ACTION to determine priority of water rights. Judgment was rendered for the defendants below on the special findings by SHOWERS, J. Reversed.

Statement of the case by the justice delivering the opinion.

This action was brought by the plaintiff to determine his right, as against the defendants, to the use of 200 inches of the waters of Crow creek for the purposes of irrigation. He asks for a perpetual injunction restraining defendants from the use of said waters to the extent of his claim of 200 inches. The plaintiff and the defendants claimed title from a common source. The plaintiff claimed the use of said waters by virtue of the conveyance to him of 160 acres of land with the said waters as appurtenant thereto. The defendants claimed the use of said

water by virtue of later conveyances of land with the water appurtenant, from the same common source of title, and also set up the statute of limitations, as against the plaintiff's right. The case was tried to the court with a jury. The jury found a general verdict in favor of the plaintiff. They also made a large number of special findings. The court set aside the general verdict, and adopted all of the special findings, and entered judgment in favor of the defendants for their costs. Plaintiff appeals from the judgment. There is nothing before us but the judgment roll, containing the pleadings, verdict, findings and judgment. No motion for new trial appears to have been made, and the evidence is not before us. The findings are, therefore, the unquestioned facts. The matter for decision is whether the findings support the judgment. Appellant contends that they do not, but that, upon such findings, judgment should have been rendered for plaintiff. The other facts of the case are stated in the opinion below.

Toole & Wallace, Cowan & Parker, Walsh & Newman and Shober & Rasch, for Appellant.

Henry C. Smith and Thomas J. Galbraith, for Respondents.

DE WITT, J.—With the elaborate special findings contained in this case, the setting aside of the general verdict by the court is not important. Special findings control the judgment, even if the general verdict be contrary thereto. (Code of Civil Procedure 1887, § 275.)

As noted in the statement, the parties claim the use of the waters from a common source of title. The plaintiff's title is long prior to that of the defendants. He purchased the ranch many years before the defendants purport to have purchased certain other premises, with, as they claim, the same waters appurtenant thereto. The jury found that, when the plaintiff purchased the ranch, there were three ditches tapping the waters of Crow creek, and conveying the same to and upon the ranch of plaintiff during the irrigating season; that the

carrying capacity of said ditches at that time was, respectively, 800, 200 and 1,000 inches; that the grantors of plaintiff owned sufficient of the waters of Crow creek to supply said ditches. This last finding, however, must be interpreted to the effect that said grantors owned the use of sufficient water to supply the ditches. It is also found that these ditches and waters were those mentioned in the deeds from plaintiff's grantors. These deeds, it is to be observed, were prior to the conveyances to defendant, the Jubilee Placer Mining Company. These deeds from plaintiff's grantors to him of said ranch and water right were duly acknowledged and recorded at the time the defendants purchased of plaintiff's grantors the right they claim in the water. At the time when the defendants purchased whatever right they had in and to the use of the waters of Crow creek, the plaintiff had one ditch, which he used during the irrigating season in carrying the waters of Crow creek upon his ranch. The carrying capacity of that ditch was 200 inches. The amount of water requisite and necessary to properly irrigate plaintiff's ranch was 160 inches. The plaintiff purchased this ranch, ditches and water right on the strength of the representations of his grantors that he was entitled to the use of said waters to the amount of 200 inches. The plaintiff paid for said ranch, ditches and water right the sum of \$3,190. The plaintiff would be seriously and materially damaged if deprived of the use of said waters. When defendants purchased from plaintiff's grantors, the said ditches were easily observed. The jury also found that the defendants, or their grantors, had not used this water in question, nor has this water been used by them for the purpose of irrigating, or for their ordinary use, or for any other useful or beneficial purpose, for a period of five consecutive years before the commencement of this action.

Such were the findings which the court adopted, and upon which it rendered judgment for the defendants for their costs. How the court arrived at such a conclusion is to us inscrutable. The facts were found in favor of the plaintiff fully and completely. Prior to the inception of the defendant's claim upon

the waters, plaintiff had bought his land from the defendants' grantor. He bought it with the water appurtenant thereto, with the water actually conducted upon the land. He continued to use the water. It was necessary for the cultivation of the land, and he would be damaged if he were deprived of the same. Plaintiff claimed 200 inches. By the findings he was allowed 160 inches. We do not obtain any light from the respondents' brief which enables us to understand the action of the court in entering a judgment absolutely contradictory to the findings.

Some questions of practice are discussed in respondents' brief, as well as that of appellant; but, in the view we take of the case, those questions are not important. One of them is as to whether the court in an equity case may set aside the findings or verdict as only advisory. But that question has long been at rest in this court. The only finding which the court set aside was the general verdict. But that, as remarked, is not important.

The respondents' counsel contends that it was the duty of the court, in rendering judgment, to construe the special findings in connection with all the testimony. It would seem, from the view that we are able to get of the case, that the court rendered its judgment totally without regard to the findings, and, perhaps, upon some testimony which is not before us. We know nothing about the testimony, and must assume that the findings are correct. If the court thought that the findings were not sustained by the testimony, it should not have adopted them, but should have made findings that the testimony supported. This judgment must be reversed, because not warranted by the findings. Furthermore, the findings are ample upon which to render a judgment in favor of the plaintiff, establishing his right to the use of 160 inches of the waters, to which the jury found him entitled. There is no occasion for a new trial in this case. The error of the court did not arise during the trial, within the contemplation of the cases below cited, but arose in rendering a wrong judgment upon the facts as found and undisputed. (*Woolman v.*

Garringer, 2 Mont. 405; *Collier v. Ervin*, Id. 557; *Barkley v. Tieleke*, Id. 435; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Stackpole v. Hallahan*, ante, page 40.)

It is therefore ordered that the judgment of the district court be reversed, and that the case be remanded, with directions to enter a judgment in favor of the plaintiff, determining his right to the use of said 160 inches of water, as found by the jury, and perpetually enjoining the defendants from interfering therewith.

Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

ON REHEARING.

[October 21, 1886.]

PER CURIAM.—After the decision of this case, we were of opinion that perhaps we should have exercised the discretion given us by section 441, Code of Civil Procedure, 1887, by granting a new trial, instead of ordering judgment. (*Schroeder v. Insurance Co.*, 60 Cal. 468; *Ehrichs v. De Mill*, 75 N. Y. 370, 376; *Thomas v. Insurance Co.*, 99 N. Y. 225; *Guernsey v. Miller*, 80 N. Y. 181.) We therefore, on our own motion, ordered a rehearing, but upon the rehearing it appeared that the time for the same, under the rules, had expired; that the remittitur had been sent to the district court, and judgment thereon entered in accordance therewith.

After a remittitur is issued, and the time for rehearing expires, and judgment is entered in the district court in pursuance to the judgment of this court, and it appears that there has been no fraud, imposition, mistake or inadvertence in issuing the remittitur, we are not sufficiently satisfied that we still have jurisdiction of the case to justify us in now rehearing the appeal. (*Mining Company v. Holter*, 1 Mont. 429; *Blanc v. Bowman*, 22 Cal. 24; *Rowland v. Kreyenhagen*, 24 Cal. 52; *People v. McDermott*, 97 Cal. 247; *People v. Village of Neliston*, 79 N. Y. 638; *Hazard v. Cole*, 1 Idaho 305; *Delaplaine v. Bergen*, 7 Hill, 591; *Latson v. Wallace*, 9 How. Prac. 334; *Hayne on New Trial and App.*, § 293.)

The original judgment of this court must remain.

S. C. HERBST IMPORTING COMPANY, RESPONDENT,
v. HOGAN, APPELLANT.

[Submitted July 9, 1895. Decided July 15, 1895.]

DEFAULT JUDGMENT—Relief—Judicial discretion.—It is not an abuse of discretion to refuse to vacate a default on the ground of excusable neglect where sickness in the family of defendant's counsel and absence of defendant through illness of his mother is made the basis of the application for relief.

PLEADING—Assumpsit—Demurrer.—A complaint for the purchase price of goods, which neither pleads any indebtedness by the defendant to plaintiff, or to any one else, nor that the goods were delivered to defendant by plaintiff or by anyone in plaintiff's behalf, or by anyone else, is bad on demurrer.

SAME—Corporations—Legal capacity to sue.—Legal capacity to sue being an ordinary incident to a corporation, a demurrer for such want of capacity must be based upon allegations appearing in the pleading and not upon the want of allegations.

SAME—Assumpsit—Demurrer.—A complaint alleging an indebtedness by the defendant to a certain company upon a balance of an account for goods sold and delivered to defendant in a given month, and the assignment of the account to plaintiff, who is the owner and holder thereof, and that the defendant has not paid said account or any part, though due and payable, is good on general demurrer.

SAME—Demurrer—Uncertainty.—Demurrer is the appropriate remedy to reach a pleading objectionable for uncertainty.

SAME—Corporation—Demurrer.—A complaint on an account assigned to plaintiff by a certain company which fails to show that such company had any legal existence or the nature thereof, is bad when specially demurred to upon that ground.

ATTACHMENT—Affidavit—Defects—Amendment.—An affidavit in attachment which fails to state whether the contract sued upon is express or implied, and which imperfectly states the title of the court, is defective, but may be cured by amendment.

Appeal from Second Judicial District, Silver Bow County.

ACTION to recover for goods sold. Judgment by default was rendered for the plaintiff below by MCHATTON, J., and defendant's motions to vacate the default and dissolve the attachment denied. Reversed.

Statement of the case by the justice delivering the opinion.

Plaintiff alleges that it was a corporation by the name of the S. C. Herbst Importing Company. The complaint then proceeded as follows:

"For a first cause of action against defendant, plaintiff says defendant is indebted to — in the sum of two hundred and eighty-two and 9-100 dollars for goods and merchandise sold and delivered to defendant at his instance and request in the

month of May, 1893; that the defendant has not paid therefor, or any part, although the same is now due and payable. For a further and separate action against defendant, plaintiff says that said defendant was heretofore justly indebted to the Silver City Distilling Company in the sum of one hundred and 25-100 dollars, on a balance of account for goods and merchandise sold and delivered by said company to defendant in the month of September, 1893; that said Silver City Distilling Company, prior to commencing this action, sold and assigned said account to plaintiff, who is the owner and holder thereof; that defendant has not paid said account, or any part, although the same is due and payable. Wherefore plaintiff demands judgment," etc.

The defendant demurred to the first cause of action, generally and specially. The special demurrer alleges that the complaint was ambiguous, unintelligible, and uncertain, in this: "Because it does not state how, when, or where, or under the laws of what state, nation, or jurisdiction, the plaintiff was organized or incorporated, or any reason or purpose for its existence, or any kind of business it is authorized to do, or where it carries on or transacts any kind of business whatever."

Defendant also demurred to the second cause of action, generally and specially, and for ground of special demurrer alleges that the complaint was ambiguous, unintelligible, and uncertain, in this: "That it does not sufficiently describe the alleged assignor or vendor of the balance of account owed for the pretended Silver City Distilling Company, or whether it has any legal existence whatever, or whether it has authority or capacity to do or transact any business of any kind or at all. It does not show when, where, or how, or by what means, if any, it was either organized or incorporated." The demurrers were overruled.

The default of the defendant for want of an answer was entered, and judgment ordered in favor of plaintiff, as prayed for in the complaint. The defendant's counsel moved to set aside the default on the ground of excusable neglect. The af-

fidavit which was made the basis of this application for relief was, substantially, that defendant's counsel was very busy with other professional matters, and was embarrassed by attention upon members of his family who were ill, and by the absence of the defendant himself, who was called away by the illness of his mother. With the application to set aside the default the defendant tendered an answer. The court refused to set aside the default.

Plaintiff secured an attachment. The title of the court in which the action was brought, and immediately preceding the affidavit proper, was imperfectly stated. The allegations of the affidavit were, among others, that the defendant was indebted to the plaintiff in the sum of \$382.34, over and above all legal setoffs and counterclaims, upon a contract for the payment of money, etc. There was a motion to dissolve the attachment on the ground of irregularity and insufficiency of the affidavit in omitting to state that the alleged contract sued upon was either express or implied, or the kind or nature of said contract. The motion to dissolve this attachment was overruled. The defendant appeals from the judgment, and from the order overruling the motion to set aside the default and judgment, and from the order refusing to dissolve the attachment.

John T. Baldwin, for Appellant.

Stephen De Wolfe, for Respondent.

HUNT, J.—We find no error in the exercise of the discretionary power of the court in refusing to set aside the default of the defendant, but are constrained to reverse the case upon other grounds.

The first count of plaintiff's complaint is fatally defective, and upon a general demurrer should have been so held. The plaintiff nowhere pleads any indebtedness by the defendant to plaintiff, or to any one else. This omission may have been a clerical error, but it is none the less material. Nor does plaintiff aver that the goods and merchandise sold and delivered to defendant were sold or delivered by plaintiff, or by any one

in behalf of plaintiff, or by any one else. There is no averment whatsoever of the count to so connect the parties with any wrong done as to entitle the plaintiff to redress.

By the special demurrer to the first count, appellant attempts to raise a question more properly tested by a demurrer based upon the ground that plaintiff has no legal capacity to sue. (Bliss on Code Pleading (3d Ed.) § 408a; Maxwell on Code Pl. pp. 370, 371.) As bearing directly on this point see the following cases, which hold that a legal capacity to sue is an ordinary incident to a corporation, and that ground of demurrer for want of capacity to sue must appear from allegations as made in the complaint, and not from want of allegations: *American B. H. & O. Co. v. Moore*, 2 Dak. 280; *Crane Bros. Manufacturing Co. v. Reed*, 3 Utah 506; Pom. Code Rem. § 208; *Smith v. Sewing Mach. Co.*, 26 Ohio St. 562; *Phoenix Bank v. Donnell*, 40 N. Y. 410.

The general demurrer to the second count was properly overruled. But, while the count states a cause of action, we think the special demurrer was well taken. Whether the Silver City Distilling Company, assignor of plaintiff, had or had not a legal existence, and what the nature of its existence was, ought, by all reasonable rules of pleading, to appear with some degree of certainty. The practice of most Code states makes uncertainty in a complaint ground for a motion to have the objectionable pleading made more certain, but, under the Montana practice, demurrer is the appropriate remedy. (Code of Civil Procedure § 87; Boone on Code Pleading § 54.)

The answer proposed by defendant pleads that the plaintiff is a foreign corporation, and never has complied with the laws of the state requiring a certificate to be filed in the office of the secretary of state, designating an agent, who shall be a citizen of the state, upon whom service of summons and other process may be made, and providing, further, that, if such foreign corporation shall fail to comply with the provisions of the statute referred to, all its contracts shall be void as to the corporation, and no court of this state shall enforce the same in favor of the corporation. Act March 8, 1893 (Sess. Laws

1893, p. 91). The court, being without brief or argument on this point, refrain from expressing any opinion upon how non-compliance with the statute may affect the contracts of the plaintiff, if the allegations of the answer are true. When this identical question was incidentally raised in Dakota, the court, by Shannon, C. J., said: "Before determining so grave a question, we must not only have a proper case, but great care must be taken to examine that class of authorities which assert the doctrine that when a statute prohibits an act, or annexes a penalty for its commission, it does not always follow that the unlawfulness of the act was meant by the lawmakers to avoid a contract made in contravention of it." (*American B. H. & O. Co. v. Moore*, 2 Dak. 280, and cases therein cited.)

We think the affidavit in attachment is defective in not stating the nature of the contract sued upon, whether express or implied. It should also be properly entitled. These defects, however, can be cured by amendment. (*Pierse v. Miles*, 5 Mont. 549; *Langstaff v. Miles*, 5 Mont. 554; *Magee v. Fogerty*, 6 Mont. 237; *Joseph v. Clothing Co.*, 13 Mont. 195.)

The judgment of the district court is reversed, and the cause is remanded with directions to sustain the defendant's general demurrer to the first count of plaintiff's complaint and defendant's special demurrer to the second count of plaintiff's complaint. The order of the district court denying the defendant's motion to dissolve the attachment is also set aside, and the cause is remanded with directions that the plaintiff have an opportunity to give such a new affidavit in attachment as the law requires. Reversed and remanded.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

THE MONTANA CATTLE COMPANY, APPELLANT, v.
FORSYTHE ET AL., RESPONDENTS.

[Submitted July 9, 1895. Decided July 15, 1895.]

APPEAL—Affirmance.—When the statement on motion for a new trial is stricken from the record on motion and the appellant's counsel concede that there is no error in the judgment roll, the judgment will be affirmed.

Appeal from Seventh Judicial District, Yellowstone County.

JUDGMENT was rendered for the defendants below by MILBURN, J. Affirmed.

Massena Bullard, for Appellant.

John T. Smith, Clifton George and Gib. A. Lane, for Respondents.

PER CURIAM.—The statement, on motion for a new trial in this case, having heretofore been stricken from the record, on motion of respondents, there is nothing now to consider, on the appeal from the judgment, but the judgment roll. As our attention has not been called to any error in the judgment roll, and as counsel for the appellant concede that there is no error therein, the judgment appealed from is affirmed.

THE FIRST NATIONAL BANK OF BUTTE, RESPOND-
ENT, v. PARDEE ET AL., APPELLANTS.

[Submitted July 1, 1895. . Decided July 22, 1895.]

PROMISSORY NOTES—Credit—Statute of Limitations—Findings.—Where suit by the assignee of a promissory note, upon which was indorsed a credit in the month of December, 1883, would have been barred by limitation, if, as defendant contended, the credit should have been given in August, 1883, a general verdict for plaintiff is not inconsistent with a special finding of the jury that the credit should have been given in August but that the plaintiff bank did not receive the money until December, it appearing that the credit grew out of a private transaction between a member of the assignor bank and the defendant, in which the bank had no interest or concern.

MORTGAGES—Foreclosure—Deficiency.—Under section 358 of the Code of Civil Procedure, authorizing the entry of deficiency judgments in actions for the foreclosure of mortgages, a deficiency judgment may be properly entered against the grantor in a deed of trust given to secure the payment of a promissory note, though there may be nothing in the terms of the deed itself to warrant the entry of a judgment for a deficiency.

Appeal from Second Judicial District, Silver Bow County.

ACTION on a promissory note and to foreclose a deed of trust. Judgment was rendered for the plaintiff below by McHATTON, J. Affirmed.

F. W. Cole and H. R. Whitehill, for Appellant.

Forbis & Forbis, for Respondent.

PER CURIAM.—This is an action on a promissory note, and for a decree foreclosing a deed of trust given to secure the payment thereof.

On the 16th day of April, 1881, the defendant executed and delivered to S. T. Hauser & Co., bankers at Butte, his promissory note for \$11,000, with interest, payable 30 days after date. The deed of trust was executed to secure the payment of the note. Thereafter the note and deed of trust were assigned to plaintiff. At the time of the bringing of the suit the note had on the back thereof the following indorsement: "Dec. 21st, 1883, paid \$5,980.59, sale of stock at 8c."

The defense to the note is the statute of limitations, the de-

fendant insisting that said payment was made on said note on the 30th day of August, 1883, and, if so, the statute of limitations had run before the institution of the suit. The replication denies that the note is barred by the statute.

Defendant testifies, in substance, that in August, 1883, he sold mining stock to A. J. Davis, who was a member of the firm of S. T. Hauser & Co.; that the price of the stock was the sum indorsed on said note; that it was the understanding that said sum should be paid on said note by Davis; that it was his impression that Davis was acting for said firm in the purchase of said stock, but did not know; that Davis never told him so; that he thinks it was in the month of August, because the weather was hot. The evidence of the officers of the bank is to the effect that the dealing between Davis and the defendant in relation to the stock was a private matter between them; that the bank had no interest or concern whatever in the transaction, and that the money was paid to the bank on the 21st day of December, 1883, by Davis, and credited on the note on that day.

The case was tried to a jury. Special findings of fact were made, and a general verdict returned in favor of the plaintiff. As special findings of fact, the jury returned that A. J. Davis purchased the mining stock of defendant in August, 1883, and that the credit on the note should have been made in that month, but that the plaintiff did not receive the money until the 21st day of December thereafter. The court entered judgment for plaintiff for the amount due on said note, decreed the foreclosure of the deed of trust, and also rendered the further judgment: "That if the moneys arising from the said sale shall be insufficient to pay the amount so found due to the plaintiff, as above stated, with the interest, and costs and expenses of sale as aforesaid, the sheriff specify the amount of such deficiency and balance due the plaintiff in his return of said sale; and that, on the coming in of said return, a judgment of this court shall be docketed for such balance against the defendant James K. Pardee, and that the defendant James K. Pardee, who is personally liable for the payment of the

debt secured by such mortgage, pay to the said plaintiff the amount of such deficiency and judgment, with legal interest thereon from the date of said last-mentioned return and judgment; and that the plaintiff have execution therefor." From the judgment, and order refusing a new trial, defendant appeals.

The appellant contends that the general verdict is contrary to the special findings, and that, as a consequence, the special findings should prevail. In view of the evidence, we do not think the contention can be sustained. It may be true that Davis bought the stock in August, and that the purchase price should have been paid by Davis, and credited on the note, in that month; but the evidence is ample that Davis did not pay it to the bank until the 21st day of December. The bank, as the evidence of plaintiff shows, had nothing to do with the transaction between Davis and the defendant in relation to the stock. There is nothing in the case to authorize the holding of the bank responsible for the failure of Davis to pay the money at the time claimed to have been agreed upon between him and the defendant. We think there is no real conflict between the special findings and the general verdict.

Appellant further contends that there is nothing in the deed of trust or complaint to warrant a deficiency judgment in this case, and claims that the judgment in that respect should, at least, be modified. Section 358 of the Code of Civil Procedure, at page 158, provided: "In actions for the foreclosure of mortgages the court shall have the power, by its judgment, to direct a sale of the incumbered property (or as much as may be necessary), and the application of the proceeds to the payment of the costs of the court, and expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment shall be docketed for such balance against the defendant, or defendants, personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor, as in other cases, in which execution may be issued." We think this statute affords ample authority for the

rendition of that part of the judgment complained of.

We think there was no abuse of discretion or error in the action of the court in refusing to continue the case on appellant's application. The showing for a continuance was insufficient. We think the judgment should be affirmed; and it is so ordered.

Affirmed.

FARWELL ET AL., RESPONDENTS, v. CASHMAN ET AL.
APPELLANTS.

[Submitted July 16, 1895. Decided July 22, 1895.]

PARTNERSHIP—Dissolution—Notice.—A partner withdrawing from a firm must, in order to exempt himself from subsequent liability to one who had previously dealt with the firm on the strength of such partner being a member, cause notice of the dissolution to be brought home to such person directly, or it must appear that the facts came to his knowledge in such a way as to give reason to believe that a dissolution had taken place.

Appeal from Eighth Judicial District, Cascade County.

ACTION for goods sold. Plaintiff's motion for a new trial was granted by BENTON, J. Affirmed.

M. M. Lyter, for Appellant.

Samuel Stephenson, for Respondent.

PER CURIAM.—Action for goods sold and delivered by plaintiff to defendants between December 9, 1891, and January 12, 1892. The defendant Talbott answered for himself alone, denying that the defendants were co-partners, and denying that he was indebted to plaintiff in the sum alleged or at all.

The case was tried to a jury. The testimony of plaintiff was that the goods had been sold and delivered to defendants in December, 1891, and January, 1892, as alleged; that the defendant Talbott was a member of the firm of J. E. Cashman & Co., and formally withdrew therefrom by an instrument in

writing, whereby he sold his interest to Cashman, on November 23, 1891; that the plaintiff sold the goods sued for to the firm upon the strength of the fact that Talbott was a member of the firm; that plaintiff had had other previous dealings with said firm while defendant Talbott was a member thereof. In September, 1891, the firm of J. E. Cashman & Co. notified plaintiff that it was made up of J. E. Cashman, G. W. Talbott, and S. Allen, and stated to plaintiff that the assets of the firm amounted to over \$10,000, with liabilities not to exceed \$1,000. Plaintiff never had any knowledge of any kind brought to it of the dissolution of the firm until long thereafter. There was no denial by the defendant of the fact that he had not notified the plaintiff of the dissolution of the firm.

The court instructed the jury, in part, as follows: "Where a person has had dealings with a firm (former dealings), it is the business of the party who retires to bring notice to the parties with whom he has dealt, and in such a case the notice must be brought home to the dealer directly, or it must appear that facts came to the knowledge of the dealer in such a way as to advise him, or give him reason to believe, that the dissolution had taken place, and that the party had retired from the firm." The jury rendered a verdict for the defendants. On motion of plaintiff, the court granted a new trial. From this order the defendant Talbott appeals.

The district court granted the motion for a new trial upon the ground that there was no evidence upon the part of the defendants showing that the notice was ever brought home to the plaintiff in this case of the fact of the dissolution of the firm of J. E. Cashman & Co., but, on the contrary, the testimony showed that plaintiff had never received any notice of the dissolution thereof. There is no complaint by the appellant that the law as to notification by a retiring partner was incorrectly stated. Our examination of the case is therefore limited to the sole question of whether, under the testimony, the plaintiff did have any knowledge of the dissolution of the firm, and of Talbott's withdrawal.

We can come to no conclusion other than that reached by

the district judge, namely, that it positively appears that they did not have any such knowledge. The order of the district court is affirmed.

Affirmed.

MERCHANTS' NATIONAL BANK, RESPONDENT, v.
GREENHOOD ET AL., APPELLANTS.

[Submitted June 24, 1895. Decided July 22, 1895.]

FRAUD—Evidence.—It is often that fraud cannot be proved by direct evidence, and where its existence is the main issue in an action, a wide latitude of evidence is therefore allowed in order that it may be detected and exposed.

SAME—Same—Findings.—Although the appellate court may not be wholly satisfied as to the evidence of fraud in conveyances by a defendant assignor to third parties, and as to the participation in such fraud by the assignee, yet, where there is as ample evidence as in this case to support the findings of the jury in these respects the verdict will not be disturbed.

DISTRICT COURT—Docket—Trial of cases.—A district court has the right to control its own docket and determine the order in which cases may be tried.

EQUITY—Action to avoid fraudulent assignment—Remedy at law.—Equity will aid a creditor who has obtained a judgment at law to reach the property of his debtor by removing fraudulent obstructions to the levy of execution thereon, and where a creditor, who has obtained a judgment in an action brought subsequent to an assignment by his debtor, seeks to levy an execution upon the property in the hands of the assignee, and upon which he had obtained a lien by attachment, and the sheriff returns upon the execution that no property is found to satisfy the execution except the property attached and which is embraced in an alleged assignment, wherefore the execution is returned unsatisfied, the creditor may maintain a bill in equity to remove such obstruction upon a showing that the transaction was fraudulent. Nor is it enough in such case that there is a remedy at law, but it must be as practical and efficient to the prompt administration of justice as the remedy in equity, which would not be the case, where, if the plaintiff resorted to his legal remedy and sold the property, a number of suits would be required before all claims were adjudicated, some of which would have to be finally settled in equity, while an equity action to avoid the assignment brings all parties before the court for the final determination of their rights.

ATTACHMENT—Abandonment of lien.—Abandonment is a question of intent, and where the acts of a plaintiff clearly indicate that he has no intention of abandoning an attachment lien, the mere issuance of an execution and its being returned unsatisfied, does not operate as an abandonment.

NEW TRIAL—Harmless error.—The admission, on the trial of a suit in equity to have an assignment declared fraudulent, of a conversation between the plaintiff and one of the defendant assignors, occurring after the assignment had been made, in which the latter stated that they had hoped to borrow money and make a settlement with their creditors, but were prevented by plaintiff's action, if error, was not of such a prejudicial nature as to warrant a reversal of the case.

EQUITY—Purchaser for valuable consideration—Fraud of assignee.—An assignee in trust for the benefit of creditors is not a purchaser for a valuable consideration within section 232, Fifth Division of the Compiled Statutes, excluding a purchaser for a valuable consideration, without notice of the fraudulent intent of his grantor, from the operation of section 229, Id., declaring void every conveyance or assignment made with the intent to hinder, delay or defraud creditors, and therefore, in an action to have an

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21	400
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24	558
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25	432
16	395
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27	291
16	395
28	94
28	328
28	370
16	395
41	37

assignment declared fraudulent, it is sufficient to establish the fraud of the assigner without showing that the assignee participated therein.

APPEAL—Rehearing.—A motion for a rehearing, not made until after the remittitur has been issued, to consider a point presented for the first time on such motion, will be denied, where the record was on file for seventeen months before the appeal was heard, voluminous briefs had been filed and counsel were allowed more than double the time for argument than the rule prescribes. (*Columbia Mining Company v. Holter*, 1 Mont. 429; *Davis v. Clark*, 2 Mont. 394, cited.)

Appeal from First Judicial District, Lewis and Clarke County.

ACTION to have an assignment declared fraudulent. The cause was tried before HUNT and BUCK, JJ., sitting concurrently. Judgment was rendered for the plaintiff below. Affirmed.

Statement of the case by the justice delivering the opinion.

The nature of this action will appear fully by the complaint therein, which pleading we have deemed best to insert in this statement in full. After the close of the trial, the court allowed the plaintiff to amend its complaint. The complaint, as finally amended under that order, is as follows:

“Now comes the plaintiff, and by leave of court first had and obtained, files this its second amended complaint, and complains on behalf of itself and all others, the judgment creditors of Greenhood, Bohm & Co., who are parties to a certain deed of assignment hereinafter mentioned, and who shall come in and seek relief by and contribute to the expense of this action, and alleges that the subject of this investigation is of common and general interest to all of said creditors under the said deed of assignment. Wherefore the plaintiff sues for the benefit of all, and alleges:

“I. That it is now, and was at all the times hereinafter mentioned, a banking corporation, organized and existing under and by virtue of the banking laws of the United States, and doing business in the city of Helena, Montana, and elsewhere.

“II. That the defendants Isaac Greenhood and Ferdinand Bohm are now, and were at all the times hereinafter men-

tioned, copartners, doing business in the city of Helena and elsewhere under the firm name and style of Greenhood, Bohm & Co.

“III. (1) That on the 13th day of February, 1892, an action was duly commenced by said plaintiff against said defendants Isaac Greenhood and Ferdinand Bohm, the copartners hereinbefore referred to, doing business under the firm name and style of Greenhood, Bohm & Co., in the district court of the First judicial district of the state of Montana, in and for the county of Lewis and Clarke, in department No. 1 of said court, by the filing of a complaint and the issuance of a summons, for the recovery of a judgment for the sum of \$20,000, together with interest thereon at the rate of 10 per cent. per annum from the 27th day of November, 1891, and for the sum of \$13,500, with interest thereon at the rate of 10 per cent. per annum from the 19th day of November, 1891, and for the sum of \$1,000, with interest thereon at the rate of 10 per cent. per annum from the 16th day of January, 1892, upon certain demand notes made, executed, and delivered by the copartnership of Greenhood, Bohm & Co. to this plaintiff.

“(2) That on said date a writ of attachment was duly issued in due form in said last named action, after the issuance of the summons therein, and placed in the hands of the sheriff of Lewis and Clarke county for execution.

“(3) That on the 15th day of February, 1892, the sheriff, by virtue of the power and authority vested in him as such officer, and under and by virtue of said writ of attachment, did levy upon and seize and take into his possession that certain stock of goods, wares, and merchandise, situate and being in that certain store building on South Main street, in the city of Helena, known and designated as No. 24, and by garnishment levied said attachment upon all the money and other property and effects of said Greenhood, Bohm & Co. in the hands of the defendant Max Kahn, assignee.

“(4) That thereafter, on the 8th day of April, 1892, judgment was duly rendered and entered in said last-named action in said district court, in favor of the plaintiff herein and

against said Isaac Greenhood and Ferdinand Bohm, copartners, etc., for the sum of \$35,945.48.

“(5) That thereafter, to wit, on the — day of April, 1892, an execution was duly issued on said judgment against the property of said defendants Isaac Greenhood and Ferdinand Bohm, copartners aforesaid, addressed to the sheriff of the county of Lewis and Clarke, state of Montana, in which county said defendants resided, and was by said sheriff returned as follows, to wit: ‘No property to be found in my county to satisfy the foregoing execution, except the property attached herein and embraced in an alleged assignment of Greenhood, Bohm & Co. to Max Kahn, on the 12th day of February, 1892, and except the above garnishments, and I herewith return said execution unsatisfied.’

“IV. That, after the contracting of the indebtedness for which the aforesaid judgment was recovered, the said defendants Isaac Greenhood and Ferdinand Bohm made, executed, and delivered to the said defendant, Max Kahn, a fraudulent, fictitious, and pretended assignment for the benefit of their creditors of all their property, a copy of which assignment is hereto attached, and marked ‘Exhibit A,’ and made a part of this complaint.

“V. That the said Max Kahn accepted the said pretended, fraudulent, and fictitious trust, and now claims all of the property of the said defendants Isaac Greenhood and Ferdinand Bohm under and by virtue of said fraudulent, fictitious, and pretended assignment, including the property levied upon and seized by the sheriff under said writ of attachment, as aforesaid.

“VI. That said Max Kahn has collected a large sum of money from the assets of said pretended assignors, amounting in all to over the value of \$7,000.

“VII. That the said pretended, fraudulent, and fictitious assignment so made and executed by the said Isaac Greenhood and Ferdinand Bohm, copartners under the firm name and style of Greenhood, Bohm & Co., on the 12th day of February, 1892, as aforesaid, was made, executed, and delivered by the said defendants Isaac Greenhood and Ferdinand Bohm for the

purpose and with the intent to hinder, delay, and defraud this plaintiff and the other creditors of said copartnership.

“VIII. That said assignment, and the said claim of the said defendant Max Kahn to the property of the defendants Isaac Greenhood and Ferdinand Bohm are fraudulent, fictitious, and pretended, because of the facts hereinafter stated, to wit:

“(1) The want of sufficient description of the property herein attempted to be conveyed, in that the following is the whole of the descriptive part of the said assignment, to wit: ‘All and singular his goods, wares, and merchandise, bills, notes book accounts, claims, demands, accounts, choses in action, evidences of debts, stock, and property, both real and personal, of every name, nature, and description and wherever situated, including the list of stock of boots and shoes, clothing, gents’ furnishing goods, notions, whiskey, and cigars, and general merchandise, book accounts, notes, etc., of the business carried on by them at their store on Main street, Helena, Montana;’ that said defendant copartnership was the owner of real estate at the time of said assignment, situated in the city of Seattle, state of Washington, worth about \$4,000, and no such description is made of such real estate that the title to the same could pass to the assignee.

“(2) That at the time of said assignment said defendant copartnership was the owner of a stock of goods situated in No. 11 Lispenard street, in the city of New York, state of New York, of the value of about \$4,500, and no reference is made to said stock of goods in the said assignment, except the general description, ‘all property, both real and personal, of every name, nature, and description, and wherever situated.’

“(3) That the aforesaid imperfect description of the property owned by the defendants at the time of the said assignment was not aided by any schedules of the property attached to the same at the time of the execution thereof or since.

“(4) That at the time of the execution of said assignment by the defendants Greenhood and Bohm, and long prior thereto, the said defendants were carrying on business in the city of New York, and also in the city of Helena, Montana,

under the firm name and style of Greenhood & Bohm in New York, and Greenhood, Bohm & Co. in Helena; that these several names were adopted for convenience in transacting business in said city of Helena, and said city of New York, but that it was one and the same copartnership.

“(5) That the laws in the state of Washington in relation to the assignment of property for the benefit of creditors provide as follows, to wit: Laws 1889-90, page 83,—an act relating to estates of insolvent debtors: ‘An act to secure creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors. Section 1. No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors, in proportion to the amount of their respective claims. And such assignment shall have the effect to discharge any and all attachments on which judgment shall not have been taken at the date of such assignment; and after payment of the costs and disbursements thereof, including the attorney’s fee allowed by law in case of judgment, out of the estate of the insolvent, and claim or claims shall be deemed as presented, and shall have *pro rata* with other claims, as hereinafter provided. * * * Section 3. The debtor shall annex to such assignment an inventory, under oath, of all his estate, real and personal, according to the best of his knowledge, and also a list of his creditors, with their post-office addresses, and a list of the amount of their respective demands, but such inventory shall not be conclusive as to the amount of the debtor’s estate.’ The said assignment, executed by said defendants Greenhood & Bohm to said defendant Max Kahn, would not pass title, even if the description had been sufficient, to the said lands in Seattle, Washington, for the reason that the same prefers one class of creditors over another, contrary to the provisions of the laws of the state of Washington touching such assignment.

“(6) That, at the date of the said pretended assignment, the said defendants Isaac Greenhood and Ferdinand Bohm were,

as plaintiff is informed and believes, individually indebted in large sums to divers and sundry persons.

“(7) That said pretended assignment provides for the payment of the individual indebtedness of the said defendants Isaac Greenhood and Ferdinand Bohm before all of the indebtedness of the copartnership of Greenhood, Bohm & Co. is paid and satisfied.

“IX. And plaintiff further alleges that said assignment was made for the purpose and with the intent of hindering, delaying and defrauding this plaintiff and the other creditors of the said copartnership in the collection of their just debts, and in support of this allegation plaintiff sets forth and alleges the following facts, to wit :

“(1) The value of the stock of goods, situated in Helena, conveyed in said deed of assignment, together with the book accounts and bills receivable, which were taken possession of at the time of the said assignment by the said defendant Max Kahn, assignee, will not exceed in value the sum of \$75,000. That the total indebtedness of said copartnership exceeds the sum of \$250,000. Of this there is placed in the preferred class about the sum of \$140,000, so that the amount of the assets taken possession of by the assignee, the said defendant Max Kahn, after paying the expenses of said assignment and their collection and disbursement, would not pay upon said preferred debts exceeding 40 per cent.

“(2) That the said Max Kahn, the assignee mentioned in the said deed of assignment, did not take possession of the stock of goods situate in the city of New York, nor attempt to do the same, and has not yet taken possession of the same, as plaintiff is informed and believes, and did not intend to take possession of the same, nor was it intended by said Greenhood and Bohm that he should. The law of New York upon the subject of taking possession of property which has been assigned, is as follows, to wit : 4 Rev. St. N. Y. (8th Ed.) title 11, page 2591, § 5 : ‘Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, by way of mortgage or security,

or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged or assigned, shall be presumed to be fraudulent and void, as against the creditors of the vendor, or the creditors of the persons making such assignment, or subsequent purchasers in good faith; and shall be conclusive evidence of fraud unless it shall be made to appear on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without intent to defraud such creditors or purchasers.' Section 6: 'The term "creditors," as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor or at any time whilst such goods and chattels shall remain in his possession or under his control.'

"(3) That the defendants Greenhood and Bohm place one Caroline Westheimer in the preferred class for \$2,500, when, as plaintiff is informed and believes, said defendants did not owe said Caroline Westheimer exceeding the sum of \$2,374.

"(4) That one Col. Morse is made a preferred creditor for the sum of \$3,500, when said indebtedness is not an indebtedness of the firm of Greenhood, Bohm & Co., but the individual indebtedness of the defendant Isaac Greenhood, and was falsely and fraudulently placed in the class of preferred creditors of the said copartnership for the purpose of hindering and defeating the plaintiff and other creditors of said copartnership from the collection of their just claims.

"(5) That the defendants Greenhood and Bohm, as the plaintiff is informed and believes, had in their possession at the time of said assignment, and have now, a large sum of money and a large quantity of goods, aggregating many thousands of dollars, and other property which they did not surrender to the assignee, and which they are fraudulently concealing for the purpose of defrauding and defeating the plaintiff and other creditors from the collection of their just debts; that said Max Kahn, the alleged assignee named in said assignment, one of

the defendants herein, was and is a party to said fraudulent concealment, and knew, as plaintiff is informed and believes, that said goods were fraudulently removed from the stock of goods in Helena, Montana, and elsewhere, and that said money was fraudulently withheld for the purpose of concealing the same, and hindering, delaying and defrauding the creditors of the said defendants Greenhood and Bohm; that, at the time of the said assignment, said defendant Kahn was the assistant bookkeeper of Greenhood, Bohm & Co., and the confidential agent of the said Greenhood and Bohm, and was made the assignee for the purpose of being used by the said Greenhood and Bohm in the fraudulent concealment of a portion of the assets of said copartnership, as above set forth.

“(6) That said defendant Greenhood conveyed by deed of mortgage to one I. Weil lots 2 and 3, in block 18, of the Story addition to the city of Helena, for the alleged purpose of securing a note of even date therewith, for \$2,500, which note is as follows, to wit: ‘\$2,500.00. Helena, Montana, February 11, 1892. Two years after date I promise to pay to Ignatz Weil, or order, twenty-five hundred dollars, for value received, negotiable and payable, without defalcation or discount, at the Traders’ National Bank, Spokane, Washington, with interest at the rate of six per cent. per annum from date until paid. [Signed] Isaac Greenhood.’ That said mortgage was filed for record in the recorder’s office of Lewis and Clarke county, Montana, on the 12th day of February, 1892, at the hour of 8:50 o’clock p. m. of said day; that said assignment, marked ‘Exhibit A’ herein, was filed for record in said office at 9:03 o’clock p. m. of the 12th day of February, 1892; that both said instruments were filed by the defendant Max Kahn, and at his request said mortgage was filed before said assignment; that, as plaintiff is informed and believes, said deed was wholly fictitious; that said mortgage was executed for the purpose of covering up and concealing a valuable piece of real estate as above described, and that said alleged assignee, Max Kahn, participated in said fraud with the said Isaac Greenhood; that the said Ignatz Weil knew nothing of said

mortgage having been executed until after the said assignment had been made, and did not attempt the same, and had nothing to do therewith, and, as plaintiff is informed and believes, had no claim against the said Isaac Greenhood for the said sum of \$2,500, or any other sum. (6½) That said Isaac Greenhood, on the date of the assignment, to wit, on the 12th day of February, 1892, executed to one H. Barnett a deed of two-thirds of an acre of land situated in Lewis and Clarke county, and fully described in said deed, for the alleged consideration of \$750, and duly acknowledged and put the same on record on said 12th day of February, 1892, at the hour of 8:55 p. m.; that said H. Barnett knew nothing of the execution of said deed until after the said assignment had been executed; that said deed was without consideration; that the same was never delivered to the said Barnett, and the execution of the same was for the purpose of covering up the land thereby conveyed, which was of the value of \$750, and hindering and delaying the plaintiff and other creditors in the collection of their just debts; that said deed, and likewise the mortgage to I. Weil as hereinbefore set forth, was not delivered or put on record until after the execution, delivery and acceptance, on the part of the alleged assignee, of said deed of assignment; and that said Max Kahn, assignee, participated in said fraudulent devices.

“(7) That in said alleged assignment W. C. Hickey is made a preferred creditor for the sum of \$4,500, and the same is not an indebtedness of the copartnership, but, if an indebtedness at all, is the individual indebtedness of the defendant Isaac Greenhood.

“X. That plaintiff is informed and believes, and so alleges, that said Bach, Cory & Co. are made preferred creditors in said pretended assignment for an amount largely in excess of the amount that was actually owing from said Greenhood, Bohm & Co. to said Bach, Cory & Co.

“XI. That said defendants Greenhood and Bohm placed one E. Rejall in the preferred class of creditors for the sum of \$45,000, when at the time of the said assignment they were indebted to him only in the sum of \$42,035.83.

“XI $\frac{1}{2}$. That on the — day of —, 1890, one I. Weil became and was a copartner of the defendants Greenhood and Bohm, in their business then being carried on in Helena, Montana, under the firm name of Greenhood, Bohm & Co., and in the city of New York under the firm name of Greenhood & Bohm; that said I. Weil from the date of said copartnership traveled as a salesman for the said Greenhood, Bohm & Co., until the 8th day of July, 1891, when he ceased to travel as such salesman for said house, and went to Sand Point, Idaho, where he purchased a stock of goods from one E. L. Weeks & Co. for the sum of about \$6,000, paying in cash therefor the sum of about \$4,000, and assuming for the remainder a balance of indebtedness owed by said Weeks & Co. to the firm of Greenhood, Bohm & Co. of Helena; that the cash payment of about \$4,000 made upon said stock of goods was raised through the firm of Greenhood, Bohm & Co.; that said Weil had but little, if any, capital of his own; that he did a large business from the date of the opening of his said house in Sand Point, Idaho, on the 1st day of August, 1891, to the date of the assignment on the 12th day of February, 1892, the same being about \$15,000 per month, aggregating the sum of \$90,000; that, as plaintiff is informed and believes, the said defendants Greenhood and Bohm were jointly interested in said mercantile establishment at Sand Point, Idaho; and that they sold and disposed of, through said I. Weil at Sand Point, and through said mercantile establishment, a large amount of goods, realizing thereon large profits in moneys, which, together with said goods on hand, they failed to turn over to the said assignee, and that all the property, except the book accounts and bills receivable of the said defendant copartnership situated in Helena, and taken possession of by the defendant Max Kahn, had been seized under an attachment by the sheriff of Lewis and Clarke county, Montana, as aforesaid, and the same is now in his hands; that large expense is being incurred for keepers and otherwise, and that to sell said property at forced sale under an execution would result in a sacrifice of the same; that there are large quantities of clothing and other goods, which are lia-

ble to get out of style and otherwise deteriorate in value by being held; that the said Max Kahn has in his possession book accounts, and is collecting the same, and will continue to do so, and will pay out the same under said fraudulent assignment, and proceed to carry out and execute said pretended, fraudulent and fictitious trust and assignment, unless restrained by the court; that it is necessary for the interest of all parties that a receiver be appointed to take charge of all the property of said copartnership, and to sell the goods, wares and merchandise, and collect up the accounts, and pay them out under the orders of this court, as it shall finally determine the rights of the parties hereto to be.

“Wherefore the plaintiff demands judgment: (1) That the said assignment and claims of said assignee are fraudulent and void, as against the plaintiff; (2) that Max Kahn account, under the directions of the court, for all the property received by him as aforesaid; (3) that the defendants be restrained by injunction from interfering with the said property or its proceeds, except under the directions of the court; (4) that said defendant Max Kahn be restrained by injunction from carrying out or proceeding further with the execution of said fraudulent, fictitious and pretended assignment and trust; (5) that the plaintiff's judgment be satisfied out of the same; (6) that a receiver be appointed to take charge of said property, sell the same, and collect the outstanding accounts, to the end that the same may be applied to the satisfaction of the plaintiff's judgment; (7) and for costs of suit, and such other and further relief as to the court shall seem just and proper.”

To the complaint was attached as an exhibit a copy of the deed of assignment made by Greenhood, Bohm & Co. to the defendant Max Kahn. The deed of assignment named as first preferred creditors the following persons, with the amounts set opposite their names: “Mrs. Catherine Westheimer, New York, \$2,500; E. Rejall, New York, \$45,000; the Merchants' National Bank, Helena, \$38,000; the First National Bank, Helena, \$17,000; Thomas Cruse Savings Bank, Helena, \$7,500; American National Bank, Helena, \$4,000; Consoli-

dated Milwaukee Beer Agency, \$750; Mrs. J. M. Ryan, Helena, \$2,000; J. Daniothy, \$1,500; W. C. Hickey, \$4,500; John Shober, \$1,000; A. W. Sederberg, \$1,000; L. Daniothy, \$520; A. M. Dorsey & Co., \$863; H. Barnett, \$1,987; Bach, Cory & Co., \$1,900; Cullen, Sanders & Shelton, \$1,000; E. Pode, \$1,000; Col. Morse, New Chicago, \$3,500; Henry Hunter, Helena, \$610."

It was provided in the deed of assignment that, if the assets were sufficient, the assignee should pay these claims in full, but if not sufficient he should pay said claims ratably. It is sufficient to say of the remaining pleadings in the case that substantial issues were made upon practically all of the material matters set up in the complaint. A long, laborious, hotly-contested trial ensued, occupying, we understand, 21 days before the court and a jury. Both of the learned judges of the district court of the First judicial district sat in the trial of the case. We are informed by the opinion of the court below that the jury was one of unusual intelligence. That jury made the following findings of fact:

"(2) What money or property, if any, did Ferdinand Bohm withhold from the assignee of Greenhood, Bohm & Co., with the intent to hinder, delay, and defraud the creditors of said firm? Answer. He withheld money, but we are unable to state the amount."

"(3) Did the defendant Isaac Greenhood retain any property from the assignee at the time that the assignment was made, with the intent to hinder, delay, and defraud the creditors of said firm of Greenhood, Bohm & Co.? Answer. Yes."

"(4) Did Isaac Greenhood and Ferdinand Bohm have any understanding with any of their creditors that they should be preferred for a larger amount than was actually due them, and the money received by such creditor or creditors should be returned to them? Answer. No."

"(5) Did the assignors have any understanding with Max Kahn, the assignee, that any of the property turned over to him as assignee, or any of the property of Greenhood, Bohm & Co., should be returned to them? Answer. No."

“(6) Did said assignors, or either of them, have any agreement or understanding with the said assignee that he should administer the trust in their favor, or so that they would receive any profits or advantage thereby? Answer. No.”

“(7) Were any of the creditors, named in the assignment as preferred for certain particular amounts, preferred for a larger amount than was due them, with a fraudulent and dishonest intent on the part of the assignors that the amount so named in excess of what was actually due to such creditor or creditors should be turned back to the assignors, or either of them? Answer. No.”

“(7 $\frac{1}{2}$) Is the amount mentioned in the assignment as due to Rejall the correct sum which was due him on February 12, 1892? Answer. No.”

“(7 $\frac{1}{2}$) If you answer the foregoing questions in the negative, was the error made in good faith, or was it purposely done, and with the intent on the part of the assignors to hinder, delay, and defraud their just creditors, or with an understanding that the excess, if any, should be turned over to the assignors, or either of them? Answer. In good faith.”

“(8) Did the assignors, or either of them, fraudulently conceal from the assignee any of the property of the firm of Greenhood, Bohm & Co., with the intent to defraud their creditors? Answer. Yes.”

“(9) Was the execution of the mortgage on his homestead by Isaac Greenhood to Ignatz Weil so made with intent on the part of said Greenhood to fraudulently conceal or cover up any of his assets? Answer. Yes.”

“(10) Was the deed made by the said Isaac Greenhood to the property in Richmond Hill addition to H. Barnett made with the intent to hinder, delay, or defraud any of the creditors of the said firm of Greenhood, Bohm & Co.? Answer. Yes.”

“(11) Did the defendant Max Kahn, as assignee, take the New York property into his possession after the assignment, or make any attempt to do so? Answer. No.”

“(12) Could he reasonably, through an agent, have taken

possession of the said property so situated in the city of New York, before the attachment of the same on the 15th of February, 1892? Answer. Yes."

"(13) Is the alleged indebtedness of Col. Morse of \$3,500, as set out in the deed of assignment, the indebtedness of the firm of Greenhood, Bohm & Co., or the personal indebtedness of Isaac Greenhood? Answer. Firm indebtedness."

"(14) What was the value of the goods situated in Helena, together with the book accounts and bills receivable, at the date of the assignment on the 12th day of February, 1892? Answer. About \$75,000."

"(15) What was the total indebtedness of Greenhood, Bohm & Co., of Helena, and Greenhood and Bohm, of New York, on the 1st day of February, 1890? Answer. About \$210,000."

"(16) What was the total indebtedness of Greenhood, Bohm & Co. and Greenhood and Bohm on the 1st day of February, 1891? Answer. About \$240,000."

"(17) What was the total indebtedness of Greenhood, Bohm & Co. and Greenhood and Bohm on the 1st day of February, 1892? Answer. About \$250,000."

"(18) How much were the defendants Greenhood, Bohm & Co. owing Caroline Westheimer at the date of the assignment? Answer. About \$2,436.93."

"(19) Was said Isaac Greenhood, at the date of the execution of the mortgage to Weil, individually indebted to said Weil? Answer. No."

"(20) Did said I. Weil know of the execution of said mortgage at the time it was executed, or before the execution of the deed of assignment, on the 12th day of February, 1892? Answer. No."

"(21) Did said I. Weil know of the execution of said mortgage and note, or have anything to do therewith until after the execution and delivery of said deed of assignment? Answer. No."

"(22) What was the value of said real estate at the date of the execution of said deed of assignment, to wit, on the 12th

of February, 1892, exclusive of improvements? Answer. About \$5,000."

"(23) What was the value of the house and improvements upon said real estate? Answer. About \$4,000."

"(24) Did H. Barnett know anything of the execution of the deed to him until after the assignment had been executed, accepted and recorded? Answer. No."

"(25) Was said deed ever delivered to H. Barnett? Answer. No."

"(26) Was there any indebtedness on the part of Greenhood, Bohm & Co. to the said Barnett at the date of the execution of the said deed on the 12th day of February, 1892? Answer. Yes."

"(27) What was the amount of the indebtedness to Bach, Cory & Co. from the defendants at the time of the assignment, to wit, on the 12th day of February, 1892? Answer. About \$1,385."

"(27½) Was the failure to deduct the amount of Bach, Cory & Co.'s indebtedness from the amount due Bach, Cory & Co. by Greenhood, Bohm & Co. done by the assignors with the intent to delay, hinder and defraud their creditors, or was it done in good faith? Answer. In good faith."

"(28) What was the actual indebtedness of the firm of Greenhood, Bohm & Co. to E. Rejall at the date of the assignment, to wit, on the 12th day of February, 1892? Answer. About \$42,035.83."

"(29) Was I. Weil a copartner in the firm of Greenhood, Bohm & Co. during the year 1890? Answer. Yes."

"(30) If you answer the foregoing question in the affirmative, state whether such copartnership was ever dissolved. Answer. Yes."

"(31) Did said I. Weil go into the mercantile business at Sand Point, Idaho, on the 1st of August, 1891? Answer. Yes."

"(32) If you answer the foregoing in the affirmative, state whether he bought out the firm of E. L. Weeks & Co. and raised the money by which to buy out said firm upon the credit of Greenhood, Bohm & Co. Answer. Yes."

“(33) If you answer the foregoing in the affirmative, state how much he raised. Answer. \$3,750.”

“(34) What was the volume of business done by I. Weil at Sand Point, Idaho, from the 1st day of August, 1891, to the 12th day of February, 1892? Answer. About \$90,000.”

“(35) Did Isaac Greenhood raise the inventory of merchandise on the 1st of March, 1891, and, if so, how much? Answer. Yes; about twenty per cent. above original cost where purchased.”

“(36) If you answer the foregoing in the affirmative, state with what intent the inventory was so raised. Answer. To cover cost of freight and expenses.”

“(37) Did Isaac Greenhood raise the inventory on the 1st of March, 1890, and, if so, how much did he raise the same? Answer. About twenty per cent. above original cost where purchased.”

“(38) If you answer the foregoing interrogatory in the affirmative, state with what intent he so raised the inventory. Answer. To cover cost of freight and expenses.”

“(39) Did Isaac Greenhood raise the inventory of merchandise on the 1st of March, 1889, and, if so, how much did he raise the same? Answer. Yes; about twenty per cent. above the original cost where purchased.”

“(40) If you answer the foregoing interrogatory in the affirmative, state with what intent he raised the same. Answer. To cover cost of freight and expenses.”

“(41) If you answer the interrogatory in relation to the raising of the inventory of merchandise of the 1st of March, 1891, state whether the defendant Ferdinand Bohm knew it had been so raised shortly after the same had been done. Answer. Yes.”

“(42) Was a credit given to each of the defendants, Isaac Greenhood and Ferdinand Bohm, on the merchandise account of the sum of \$5,000, on the 30th of June, 1891? Answer. Yes.”

“(43) If you answer the foregoing in the affirmative, state

with what intent this was done. Answer. To make a better showing in the capital stock of the partners."

"(41) What was the amount of the inventory of merchandise of Greenhood, Bohm & Co. on the 1st of February, 1892? Answer. \$57,564.30."

"(45) What was the average gross profits on the sales of merchandise of the firm of Greenhood, Bohm & Co. from the 1st of March, 1891, to the 1st of February, 1892? Answer. The average profit was about twenty-five per cent."

"(46) What was the amount of merchandise on hand on the 1st of March, 1891, at Helena? Answer. About \$139,929.56."

"(47) What was the amount of purchases from the 1st of March, 1891, to the 1st of February, 1892? Answer. \$257,204.62, including freight on the same. Freights, \$15,044.37."

"(48) What was the amount of sales from the 1st of March, 1891, to the 1st of February, 1892? Answer. \$342,173.82."

"(49) What amount of merchandise should have been on hand on the 1st of February, 1892? Answer. They should have had about \$120,000 on hand in merchandise."

"(50) Did the defendants Greenhood and Bohm borrow from E. Rejall the sum of \$59,400, from the — day of June to the — day of December, 1891? Answer. Yes."

"(51) Did the said Greenhood and Bohm reduce the indebtedness of the firm of Greenhood, Bohm & Co. and Greenhood & Bohm, during the years 1890 and 1891, or did they increase their indebtedness? and state how much said debts were increased or decreased. Answer. They increased their indebtedness about \$40,000 during the years 1890 and 1891."

"(52) Did the defendants Greenhood and Bohm, both or either of them, make the deed of assignment on the 12th of February, 1892, with the intent to hinder, delay or defraud their creditors, or any of them, out of their just debts? Answer. Yes."

"(53) If you answer the foregoing in the affirmative, state

whether the defendant Max Kahn participated in such fraudulent intent. Answer. Yes."

"(54) Did Greenhood, Bohm & Co. own forty shares of stock in the Consolidated Milwaukee Beer Company at the date of the assignment, and, if so, what was its value? Answer. Yes. Value, \$1,350."

"(55) If you answer the foregoing interrogatory in the affirmative, state whether they had transferred the same to Max Kahn as collateral or pledge for indebtedness owed by the firm of Greenhood, Bohm & Co. to the said Consolidated Milwaukee Beer Company before the date of the assignment. Answer. Yes."

"(56) Has said stock been sold since the assignment, and the debt of the said Consolidated Milwaukee Beer Company been paid out of the proceeds thereof? Answer. Yes."

"(57) Did Greenhood and Bohm, both or either of them, appropriate any portion of the assets of the firm of Greenhood, Bohm & Co., either in money or goods, wares and merchandise, at or before the execution of said assignment, and did they have the same, or any portion thereof, in their possession or under their control at the time of the assignment, and fail or refuse to turn the same over to the assignee? Answer. Yes; both of them."

"(58) If you answer the foregoing question in the affirmative, state whether they so failed or refused to turn the same over to the assignee for the purpose of hindering, delaying or defrauding their creditors. Answer. Yes."

"(59) Was the consideration for which the original note, of which the present note held by W. C. Hickey was a renewal, received by Isaac Greenhood individually, and used for his individual benefit, or was it received by the firm of Greenhood, Bohm & Co., and used by said firm? Answer. It is a firm obligation."

"(60) Was the Hickey transaction done with fraudulent intent? Answer. No."

The court adopted all of these findings. The court thereupon of its own motion also made the following findings :

“(1) That the Merchants' National Bank, of Helena, Montana, is, and was at all times mentioned in the amended complaint filed in this action, a banking corporation, organized and existing by virtue of the banking laws of the United States, and doing business in the city of Helena, Montana, and elsewhere.

“(2) That the said Isaac Greenhood and Ferdinand Bohm are now, and were at all the times mentioned in the amended complaint filed in this action, copartners doing business in the city of Helena, and elsewhere, under the firm name and style of Greenhood, Bohm & Co.

“(3) That on the 13th day of February, 1892, an action was duly commenced by the plaintiff, the Merchants' National Bank, of Helena, Montana, against the defendants Isaac Greenhood and Ferdinand Bohm, copartners doing business under the firm name and style of Greenhood, Bohm & Co., in the district court of the First judicial district of the state of Montana, in and for the county of Lewis and Clarke, in department No. 1 of said court, by the filing of a complaint and the issuance of a summons, for the recovery of a judgment for the sum of \$20,000, together with interest thereon at the rate of ten per cent. per annum from the 27th day of November, 1891, and for the sum of \$13,500, with interest thereon at the rate of ten per cent. per annum from the 19th day of November, 1891, and for the sum of \$1,000, with interest thereon at the rate of ten per cent. per annum from the 16th day of January, 1892, upon certain demand notes made, executed, and delivered by the copartnership of Greenhood, Bohm & Co. to said plaintiff.

“(4) That on said date a writ of attachment was duly issued in due form, in said last-named action, after the issuance of the summons herein, and placed in the hands of the sheriff of Lewis and Clarke county, Montana, for execution.

“(5) That on February 15, 1892, the said sheriff, by virtue of the power and authority vested in him as such officer, and under and by virtue of said writ of attachment, did levy upon and seize and take into his possession that certain stock of

goods, wares, and merchandise, situate and being in that certain store building on South Main street, in the city of Helena, known and designated as No. 24, and on said date attached by garnishment all the money and other property and effects of said defendants Greenhood, Bohm & Co., in the hands of Max Kahn, assignee.

“(6) That thereafter, on the 8th of April, 1892, judgment was duly rendered and entered in said last-named action in said district court, in favor of the plaintiff in said action, and against said Isaac Greenhood and Ferdinand Bohm, copartners as aforesaid, for the sum of \$35,945.48, with interest thereon at the rate of 10 per cent. per annum from the date of said judgment.

“(7) That thereafter, to wit, on the 18th day of April, 1892, an execution was duly issued on said judgment against the property of said defendants Isaac Greenhood and Ferdinand Bohm, copartners as aforesaid, addressed and directed to the said sheriff of Lewis and Clarke county, state of Montana, in which said county said defendants reside, and was by said sheriff returned with the following indorsement thereon, to wit: ‘No property to be found in my county to satisfy the foregoing execution, except the property attached herein, and embraced in an alleged assignment from Greenhood, Bohm & Co. to Max Kahn, on the 12th day of February, 1892, and except the above garnishments; and I herewith return the said execution unsatisfied.’ And the court further finds from the said return that, so far as garnishees answered, there was only \$4.42 levied upon by virtue of said execution.

“(8) That the defendants Isaac Greenhood and Ferdinand Bohm, or either of them, have not, and did not have at the time of the issuance and return of said execution, any property in this state, known to the plaintiff, out of which said execution so issued as aforesaid could be satisfied in whole or in part, except that claimed by the said Max Kahn as assignee, under and by virtue of the assignment sought to be set aside in this action.

“(9) That the said defendant in this action, Max Kahn, is a

man without means, and pecuniarily and wholly irresponsible, and has not given any bond for the faithful performance of his duties as assignee.

“(11) That the said deed of assignment was executed and delivered by the assignors to Max Kahn, the assignee, and accepted by him about 7 o'clock p. m. on the 12th day of February, 1892.”

The deed of assignment was recorded by the county clerk and recorder, and the court also found that the same was duly acknowledged by the parties executing the same. The court found, as conclusions of law, as follows:

“(1) That the said assignment was made, executed, and delivered with the intent on the part of the said assignors, Isaac Greenhood and Ferdinand Bohm, with intent to hinder, delay, and defraud the plaintiff herein, and other creditors of the said defendants Isaac Greenhood and Ferdinand Bohm, and of the firm of Greenhood, Bohm & Co., and is fraudulent and void as to plaintiff and the other creditors not assenting thereto.

“(2) That the plaintiff, by its writ of attachment and judgment in the said action so commenced on the 13th day of February, 1892, and the levy so made under said writ of attachment, has a lien upon all property seized and levied upon by the said sheriff, under and by virtue of the said writ of attachment, and the proceeds thereof in the possession and under the control of the receiver appointed in this action, or so much thereof as may be necessary to satisfy the plaintiff's judgment, interest, and costs, which lien took effect on the 15th day of February, 1892, at the time of the said seizure and levy, and under and by virtue of the said writ of attachment.

“(3) That the plaintiff, by virtue of the said judgment and execution and the commencement of this action, has a lien upon all the property of every description, and the proceeds thereof, in the possession and under the control of the receiver appointed in this action, or so much thereof as may be necessary to satisfy plaintiff's judgment, interest, and costs, which lien

took effect upon the 21st day of April, 1892, when the complaint herein was filed and the summons herein was issued. Judgment and decree ordered accordingly."

The judgment was in accordance with the findings, and need not be recited. A motion for new trial was made by defendants and denied by the court, from which motion, and also from the judgment, the defendants appeal. The grounds for a motion for a new trial, and the alleged errors relied upon by the appellants, are stated as they are discussed in the opinion below.

Cullen & Toole, T. C. Bach, Walsh & Newman, J. T. Walsh, Shober & Rasch, H. N. Blake, and Geo. F. Shelton,
for Appellants.

1. The plaintiff fails to set forth in its amended complaint any ground for the equitable interference of the court. While there is some conflict in the authorities as to the right of a creditor to seize the property in the hands of the assignee, still, in this case, the plaintiff elected to so proceed and caused the sheriff to take it into his possession under the writ of attachment to hold subject to sale under execution upon any judgment the plaintiff might recover. The plaintiff certainly cannot now be heard to say that its proceedings under said writ were without authority of law. Where the assigned property has been thus seized by a creditor the assignee may bring an action of trespass, and this will raise the question as to the validity of the assignment. (*Massey v. Noyes*, 26 Vt. 462; *Hutchinson v. Lord*, 1 Wis. 286; Burrill on Assignments, § 452.) The plaintiff having elected to treat the assignment as an absolute nullity, must stand or fall by the consequences of those acts. The sheriff having seized the property under this writ and taken the same into his possession did so "as security for the satisfaction of any judgment that might be recovered in said action." (Code of Civil Procedure, § 181.) Section 191.—"The sheriff shall make a full return of the property attached and return the same with the writ." Section 192.—* * * "Property attached by him shall be

retained by him to answer any judgment that may be recovered in the action." Section 194.—"If judgment be recovered by plaintiff the sheriff shall satisfy the same out of the property attached by him." "An attachment lien upon property can be enforced only by a sale of the attached property under execution." (*Meyers v. Mott*, 29 Cal. 860.) This is a suit in equity, in the nature of a creditor's bill, and the equitable jurisdiction depends for its existence upon the absence of a plain, speedy and adequate remedy at law. In order to maintain a creditor's bill, the creditor must first have exhausted his remedy at law. If he seeks the aid of a court of chancery against the real estate of his debtor, he must show a judgment at law, creating a lien on such estate. If he seeks aid in regard to the personal estate, he must show an execution which he has pursued to every available extent at law, before he can resort to equity for relief. (*Binkerhoff v. Brown*, 4 Johns. Ch. 671; *Jones v. Green*, 1 Wallace 330; *Beck v. Burdette*, 1 Paige 308.) The obstruction, fraudulent or inequitable, appears from the authorities to be some obstruction by which the property is placed beyond the reach of the execution, and is in such a position that the plaintiff cannot avail himself of it without the aid of a court of equity. (*Cassidy v. Meacham*, 3 Paige 311, 3 Pomeroy's Equity Jurisprudence, § 1415; *Freeman on Executions*, §§ 427, 428; *Bassett v. Orr*, 7 Biss. 296; *In re Remington*, 7 Wis. 643; *Buckeye Engine Co. v. Donau Brewing Co.*, 47 Fed. Rep. 6; *Gerry v. Gerry*, 63 N. Y. 252; *Schubert v. Howell*, 39 N. E. 913 (Illinois); *Pond v. Howard*, 34 N. E. 768; *Kittle v. August T. & G. R. Co.*, 65 Fed. 859.) Court could not appoint receiver in aid of an attachment. (*State ex rel N. Y. Sheep Co. v. District Court*, 14 Mont. 577.) A bill to remove a fraudulent obstruction must show that the execution is outstanding and "its return would be fatal to the relief sought." (*McElhain v. Willis*, 9 Wend. 548, 561; *Brock v. Rich*, 43 N. W. 580.) The rule is well settled that the creditor's bill filed for the purpose of removing a fraudulent obstruction must show that such removal will enable a judgment creditor to attach the property. (*Spring v.*

Short, 90 N. Y. 545; *Thurber v. Blank*, 50 N. Y. 80; *Lynch v. Crary*, 52 N. Y. 184.) Where the subject matter or primary right, or interest, although legal, is one of a class which may come within the concurrent jurisdiction of equity, and an action at law has been already commenced, a court of equity will not, unless some definite and sufficient ground of equitable interference exists, entertain a suit over the same subject matter, even for the purpose of granting relief peculiar to itself, such as cancellation, injunction, etc., and much less grant the same kind of relief which can be obtained by a judgment at law. The ground which will ordinarily prevent the application of this doctrine, and will permit the exercise of the equitable jurisdiction in such cases, is the existence of some distinctive equitable feature of the controversy, which cannot be determined by a court of law. This rule results, in part, in the United States, from the provisions of the national and state constitutions, securing the right to a jury trial, which belongs especially to the machinery of legal actions. (1 Pomeroy Eq. Juris. § 179; *Bank of Bell Falls v. Rutland, etc. R. R. Co.*, 28 Vt. 470; *Crane v. Bunnell*, 10 Paige 333; *Hipp v. Babin*, 19 How. 271; *Ins. Co. v. Bell*, 13 Wall. 616; *Oelrichs v. Spain*, 15 Wall. 211 to 228; *Grand Chute v. Winegar*, 15 Wall. 373; *Smith v. McIver* 9 Wheat. 532.)

II. The conveyances of Greenhood to Barnett and Weil were not a fraud upon any of the creditors of Greenhood, Bohm & Co. That a debtor may prefer and secure his creditors is too well settled to require citation of authorities. The conveyances were executed to secure valid and existing debts against the firm. The property conveyed was owned individually by Greenhood, and he could thus use it to secure the creditors of the firm or his individual creditors. (*Curtis v. Valiton*, 3 Mont. 153; *Crawford v. Neil*, 144 U. S. 585; *Smith v. Perine*, 24 N. E. 804; *Armstrong v. Hurst*, 18 S. E. 150; *Trumbo v. Hammel*, 8 S. E. 83; *Auley v. Ostermann*, 25 N. W. 657; *Schoveley v. Kovar*, 18 N. W. 134; *Fairbanks v. Haynes*, 23 Pick. 326; *Sampson v. Arnold*, 19 Iowa 480; *Sweitzer v. Higby*, 63 Mich. 13.) It is conceded they each

retained small sums of cash, enough only for present necessities, but that is not fraudulent. (Cases cited below and *Shotwell v. Nicollet Bank*, 45 N. W. 842. See *Worthun v. Griffith*, 28 S. W. 286; *Parsell v. Patterson*, 47 Mich. 505; *Wilson v. Forsyth*, 24 Barb. 105; *Ecke v. Copeland*, 53 Tex. 501; *Burrill on Assignments*, 6th Ed. § 252.) Unintentional error in stating amount due creditor does not vitiate the assignment. (*Barrochlet v. Fisch*, 63 Cal. 462; *Smith v. Bowey*, 51 Wis. 258; *Pinneo v. Hart*, 30 Mo. 561, 77 Am. Dec. 625; *Jones v. McQueen*, 14 So. 146; *Roberts v. Buckley*, 39 N. E. 966.) This last case, is the same as *Roberts v. Vietor*, 130 N. Y. 598, cited by respondents; on the second appeal the court overruled the decision in the 130th N. Y. and commented upon and approved *Peyser v. Meyers*, 32 N. E. 699. And by way of analogy, we cite: *Bank v. Seligman*, 34 N. E. 196; *Spellman v. Freedman*, 29 N. E. 765; *Aligg v. Bishop*, 36 N. E. 1058; *Maass v. Falk*, 40 N. E. 504.

III. Even though it were proven that the assignors fraudulently secreted and failed to turn over assets, that fact does not invalidate the assignment. (*Emerson v. Senter*, 118 U. S. 3; *Estes v. Gunter*, 122 U. S. 450; *Vernon v. Davis*, 2 S. E. 114; *Reinhard v. Bank*, 6 B. Mon. 252; *Wilson v. Berg*, 88 Pa. St. 167.) A partial assignment is valid when not prohibited by statute. (*Buck v. Chase*, 52 N. W. 196; *Loomis v. Stewart*, 75 Ia. 387.) In a conveyance made directly to a creditor, in satisfaction of, or as security for his debt, the law is so indulgent that though he know the assignor is doing it to defraud his other creditors, yet if the grantee takes it honestly to secure or pay his claim, and not to aid the debtor in his fraudulent purpose, the transfer is good. A marked distinction exists between such cases and those in which a party becomes a voluntary purchaser, even though he pay cash. (*Aultman v. Heiney*, 13 N. W. 856; *Chase v. Walters*. 28 Iowa 460.) And why should the rule be different here? This conveyance, in substance, is to the creditors and not to Kahn. So say the authorities. (Bump on Fraudulent Conveyances, 360.)

IV. There is no allegation, nor is there any testimony that any of the creditors participated in, or had any knowledge of any fraud; or that there was any understanding or agreement between any of them and the assignors or assignee, that the assignors should receive any benefit from the assignment. They cannot be deprived of their rights thus acquired when they did not participate in, or have knowledge of any fraud. Their rights cannot be affected by any antecedent or subsequent acts of the grantors; nor can they be affected by any intent on the part of the grantors of which they, the beneficiaries, had no knowledge, and in which they did not participate. (*Cornish v. Dews*, 18 Ark. 172; *Emerson v. Senter*, 118 U. S. 3; *Estes v. Gunter*, 122 U. S. 450; *Peters v. Bain*, 133 U. S. 670; *Pettit v. Parsons*, 33 Pac. 1038; *Ruffner v. Welton Coal & Salt Co.*, 15 S. E. 48; *Mean v. Montgomery*, 23 Fed. 421; *Ball v. Rooks*, 50 Fed. 898; *Hempstead v. Johnson*, 18 Ark. 123; *Marbury v. Brooks*, 7 Wheat. 556; *Brooks v. Marbury*, 11 Wheat. 78 and 88; *Thompson v. Wheeler*, 16 Peters 106; *Shelly v. Booth*, 73 Mo. 74; *Kinney v. Dow*, 13 Am. Dec. 342; *Pruit v. Wilson*, 103 U. S. 361; *Cohn v. Ward*, 9 S. E. 41; *Klee v. Reitzonberger*, 23 W. Va. 749; *Bank v. Arthur*, 3 Grat. 173; *Truss v. Davidson*, 7 So. 812; *Shearer v. Loftin*, 26 Ala. 703; *Jewell v. Knight*, 123 U. S. 426; *Stover v. Herrington*, 7 Ala. 142; *Abercrombie v. Bradford*, 16 Ala. 704; *Governor v. Campbell*, 17 Ala. 566; *Insurance Co. v. Pittiway*, 24 Ala. 544; *Miles v. Hayne*, 3 Head, 332; *Hill v. Woodbury*, 49 Fed. 138; *Porter v. James*, 67 Fed. 21; *Morris v. Lindauer*, 54 Fed. 23.) Poverty of assignee is no ground for avoiding an assignment. (*Argell v. Rosenberg*, 12 Mich. 241; *Pearce v. Beach*, 12 How. Pr. 404; *Clark v. Groon*, 24 Ill. 316; *Taylor v. Watkins*, 13 So. 811.)

V. The plaintiff was permitted by the court to prove statement by the assignors concerning their intentions in making the assignment, which statements were made some days after it was executed, and after possession had been delivered under it, and after the goods had passed into the possession of the

sheriff under the attachment. This evidence was inadmissible. (§§ 620, 621, Code of Civil Procedure; *Silva v. Serpa*, 86 Cal. 1013; *Walden v. Purvis*, 73 Cal. 518; *Hutchings v. Hutchings*, 48 Cal. 152; *Jacobs v. Remsen*, 36 N. Y. 668; *Sprague v. Kneeland*, 12 Wend. 161; *Coyne v. Weaver*, 84 N. Y. 386; *Chase v. Horton*, 143 Mass. 118; *Roberts v. Medbury*, 132 Mass. 100; *Bogert v. Phelps*, 14 Wis. 95; *Adler v. Apt*, 30 Minn. 45; *Bates v. Ableman*, 13 Wis. 644; *Ohio, etc., v. Davenport*, 47 Ohio St. 194; *Schebel v. Jordan*, 30 Kan. 353; *Bisby v. Carskaddon*, 63 Ia. 174, S. C., 70 Ia. 726; 1 Phillips on Evidence, 318-322. See *Truax v. Slater*, 86 N. Y. 632; *Kane v. Larkin*, 30 N. E. 105; 131 N. Y. 300; *Cayler v. McCartney*, 40 N. Y. 224.)

VI. If the assignment could be set aside by the court, the only decree it could make in this proceeding would be a decree to marshal the assets and to require all the creditors to come in and prove up their claims, to the end that they might share *pro rata* in the funds. The plaintiff has no lien prior to any of the other creditors. It abandoned its lien under the attachment and execution, if it ever had a lien, when it ordered the execution to be returned unsatisfied, while the property was in the hands of the sheriff. When an execution is returned or becomes dormant the lien created by it is extinguished. (Wait on Fraudulent Conveyances, § 87 on page 137; *Buswell v. Lincks*, 8 Daily 527; *Watrous v. Lathrop*, 4 Sanford, N. Y. 700; *Richards v. Cunningham*, 6 N. W. 475; Freeman on Executions, 207; *Buckeye Engine Co. v. Donau Brewing Co.* 47 Fed. 6.)

B. Platt Carpenter and McConnell, Clayberg & Gunn, for Respondent.

I. It is argued that it does not appear that the execution issued on the judgment previously obtained by the plaintiff against the defendants, Isaac Greenhood and Ferdinand Bohm, was returned *nulla bona*, and that such a return is necessary to sustain an action of this character. There are two classes of creditors' action: One where the enforcement of the legal

remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it, and the action is brought to remove such obstruction, and the other, for the discovery of assets and to reach equitable assets which are not subject to execution at law. (*Seibert v. Pittsburg*, 1 Wall. 272; *Beck v. Burdett*, 1 Paige Ch. 305; Pomeroy's Eq. Jurisprudence, § 1415; Freeman on Executions, § 424; *Tuck v. Olds*, 29 Fed. Rep. 738.) In order to maintain a creditor's action to reach property not open to execution at law, it must appear that the plaintiff has no adequate remedy at law. The usual method of establishing the fact of the inadequacy of the remedy at law is by obtaining a judgment and issuing an execution, which is returned *nulla bona*. This method, however, is not exclusive. Whenever the complaint shows that the debtor is insolvent, or has no property subject to execution, the action is sustained without the issuance and return of an execution. In such a case the issuance of an execution would be an idle ceremony. Where the creditor's action is brought to remove a fraudulent obstruction, the inadequacy of the remedy at law does not depend upon the want of legal assets, but upon the fact that there is a fraudulent incumbrance or other obstruction in the way of making the legal estate of the debtor available. In such a case the issuance of an execution is unnecessary, unless for the purpose of obtaining a lien upon the property of the debtor. (*Case v. Beauregard*, 101 U. S. 688.) In some of the cases it is held that an attachment lien will not support a creditor's bill before judgment is obtained. But the decisions are uniform that after judgment the lien acquired by the levy of an attachment is sufficient. (*Tappan v. Evans*, 11 N. H. 311-327; *Chicago Bridge Co. v. Packing Co.*, 46 Fed. 584; *Sheafe v. Sheafe*, 40 N. H. 518; *Conroy v. Words*, 13 Cal. 633; *Robert v. Hodges*, 16 N. J. Eq., 305; *Bob v. Woodward*, 50 Mo. 95; *Zell v. Soper*, 75 Mo. 406; Pomeroy's Equity Jurisprudence, § 1415, and note; *Naussauer v. Techner*, 65 Wis. 288; *Benham v. Ham*, 34 Am. St. R. 851; *Heymenan v. Donneberg*, 65 Am. Dec. 519; *Leopold v. Silverman*, 7 Mont. 266.) The New York cases cited by ap-

pellant to sustain their position that the issuance and return of an execution *nulla bona* is a condition precedent to the exercise of chancery jurisdiction in all creditor's actions,—are not in point as in that state the matter is regulated by statute.

II. Plaintiff did not lose its lien, acquired by virtue of the attachment, by the return of the execution unsatisfied. (§ 204 Code of Civil Procedure, Compiled Statutes.) “When an attachment is served, a lien on the property attached is created, which nothing subsequent can destroy but the dissolution of the attachment.” (Drake on Attachment, § 224.) Where property has been attached, the only function of an execution is to operate as an order of sale or power of attorney to sell the attached property. (§§ 194, 319 Code of Civil Procedure, Compiled Statutes.) Under the special return made by the sheriff, upon the execution, showing no levy of said writ upon said attached property, the issuance of the execution and this special return can not in any manner affect said property or the lien acquired by the levy of the attachment. The omission to note in the return a levy of the execution upon this attached property shows plainly the intention of the sheriff not to interfere with the property or the lien acquired by the attachment. There are cases holding that a plaintiff cannot seek the aid of a court of equity to remove a fraudulent transfer if the debtor has other property unincumbered sufficient to satisfy the judgment rendered against him. This is upon the theory that if the debtor has property open to execution sufficient to satisfy the judgment against him, any transfer he may have made does not operate as a fraud upon the creditor. (*Dunham v. Cox*, 10 N. J. Eq. 467; *Brinkerhoff v. Brown*, 4 John's Ch. 674.) Under these authorities it was necessary, notwithstanding the lien acquired by the attachment, to endeavor to reach other property not embraced within the fraudulent transfer before going into equity. It was proper and necessary to ascertain that there was no property to be found except the particular property attached before commencing the present action. Where property has been attached which is embraced within a fraudulent assign-

ment and which is insufficient to satisfy a judgment obtained in the action, the plaintiff may commence a creditor's action for the double purpose of removing the fraudulent transfer and discovering and reaching equitable assets which are not open to execution. (*Beam v. Bennett*, 51 Mich. 149; *Reeg v. Burnham*, 55 Mich. 39; *Cryler v. Moreland*, 6 Pai. Ch. 271.) This action, therefore, is an action to remove a fraudulent conveyance and make the lien acquired by the attachment effectual, and also to reach property not subject to execution at law. It was not certain that the proceeds of the property attached would be sufficient to satisfy plaintiff's claim after payment of costs, and for that reason the action was commenced for the double purpose stated. In any event, it clearly appears that so far as the other creditors are concerned, if they had seen fit to come in under the invitation extended, it would be necessary to discover and reach property not subject to execution in order to satisfy their claims.

III. Appellants submit the proposition that an attachment lien upon property can be enforced only by a sale of the attached property under execution. "There is an inherent power in a court of law, as well as in a court of equity, to control its own process and in the disposition of property in custody of the law, so as to prevent serious injury to the parties interested in said property and to afford justice and adequate relief." This is the language used in the opinion in the case of *Naunberg v. Hyatt*, 24 Fed. 902. See also *Knippendorf v. Hyde*, 110 U. S. 276; *Raisen v. Stratham*, 22 Fed. 144; *McCann v. Superior Court*, 15 Pac. 448. The fact that the statute of this state provides for the sale by the sheriff of the property attached, etc., does not abrogate the right of the court to control its process as laid down in the decision just cited. "The statute is to be read in harmony with the existing principles of equity jurisprudence, if the intention to do way with the application of such principles is not manifest." (*Beach's Equity Jurisprudence*, § 931; *Lowell v. Doe*, 44 Minn. 144; same case, 46 N. W. 297.)

IV. The admission of what appellants term "subsequent

statements of assignors," is assigned as error. It appears from the allegations of the complaint and the findings of the jury that Max Kahn participated in the fraudulent intent of the assignors in making such assignment. It also appears that the assignors retained possession of both money and goods, wares and merchandise, aggregating thousands of dollars, with the intent to hinder, delay and defraud the creditors. It also appears that possession of the property in New York was never taken by the assignee, although he could have taken possession. In view of the allegations of the complaint, and the findings just referred to, the evidence objected to was clearly competent. Declarations or admissions of assignors when in possession of property assigned, are always admissible. (*Murch v. Stevenson*, 42 N. W. 290; *Newlan v. Lynn*, 49 N. Y. 661; *United States v. Griswold*, 8 Fed. 556; *Hamburg v. Wood*, 18 S. W. R. 623; *Rice on Evidence*, page 950 and cases cited; *Bump on Fraudulent Conveyances* page 588; *Franklin v. Coots*, 41 Mich. 75.) Wherever there is a conspiracy to defraud or a concert of action or intent on the part of the assignor and assignee, subsequent declarations of the assignor are admissible. (*Reihl v. Foundry Association*, 3 N. E. 633; *Hunsinger v. Hoffer*, 11 N. E. 463; *Hamburg v. Wood*, 18 S. W. 623; *Kromer v. Kaden Clothing Co.*, 17 Atl. R. 580; *Burrill on Assignments*, § 362; *Apthorp v. Comstock*, 2 Pai. Ch. 488; 1 *Greenleaf on Evidence*, § 111; *Rice on Evidence*, page 960; *Kleinschmidt v. Dunphy*, 1 Mont. 118.) But, admitting for the sake of argument, that this evidence was wholly inadmissible, the admission of the same was error without prejudice, because of the findings of the jury that a large amount of assets was retained and not delivered under the assignment; that there were illegal preferences, and that there were other fraudulent transfers at about the same time. It is well settled that in an equity case the admission of improper testimony, or the rejection of proper testimony, is no ground for a new trial, if the court, upon consideration of all the testimony, is satisfied that justice has been done. (*Anthorp v. Comstock*, 2 Paige 482; *Head v.*

Head, 1 Sim. and Stu. 150; same case on Appeal, 1 Turner & Russell 142; *Barker v. Bay*, 2 Russell 63 and note; *Forrest v. Forrest*, 25 N. Y. 510; *Mulloch v. Mulloch*, 1 Edwards Ch. 14; *Forrest v. Forrest*, 8 Bosworth 654; *Snell v. Loucks*, 12 Barb. 389; *Sawyer v. Campbell*, 22 N. E. 458; *King v. Whaley*, 59 Barb. 71; *Matter of R. R. Co.*, 90 N. Y. 347.

V. In order to render an assignment for the benefit of creditors made under the laws of this state, void, it is not necessary that there should be a fraudulent intent both on the part of the assignor and the assignee. (§§ 229, 232, Fifth Division, Compiled Statutes, quoted in the opinion of the court.) In order to demonstrate to a mathematical certainty that the intent referred to in section 229 is the intent of the assignor it is only necessary to show that the assignee under an assignment for the benefit of creditors is not a purchaser for a valuable consideration. (*Farrington v. Sexton*, 43 Mich. 456; *Chace v. Chapin*, 130 Mass. 131.) The courts of the state of New York and of the other states in which this statute has been adopted in substance have universally held that a fraudulent intent on the part of the assignor is sufficient to vitiate the assignment, although the assignee is not a party to such fraudulent intent. (*Griffin v. Morquardt*, 17 N. Y. 28; *Meade v. Phillips*, 1 Sandf. Ch. 83; *Rathburn v. Platner*, 18 Barb. 272; *Gove v. Murphy*, 6 Minn. 305; *Loos v. Wilkinson*, 18 N. E. 99; *Stearn v. Kelley*, 88 N. Y. 418; *Young v. Henderson*, 66 N. Y. 382; *Savage v. Knight*, 53 Am. R. 423; *Burrill on Assignments*, § 307, and cases cited; *Swartz v. Hazlett*, 8 Cal. 128; *Ter. v. Figg*, 37 Cal. 328; *Judson v. Tyford*, 84 Cal. 508; *Peters v. Bane*, 133 U. S. 670.)

VI. The jury found that the assignors fraudulently withheld and concealed property from the assignee. The jury also found that on the 1st day of February, 1892, the inventory amounted to \$57,564.30, and that it should have amounted to \$120,000. These findings alone are sufficient to establish a fraudulent intent on the part of the assignors and to vitiate the assignment. (*Farrington v. Sexton*, 43 Mich. 456; *Coursey v. Morton*, 132 N. Y. 556; *Smith v. Mitchell*, 12 Mich. 180;

Farrington v. Sexton, 43 Mich. 454; *Hubbard v. McNaughton*, 43 Mich. 220; *Baun v. Pierce*, 7 S. R. 548; *Ailsworth v. Dran*, 12 Pac. 241; Burrill on Assignments, chapter 19; § 226, Fifth Division of the Compiled Statutes.)

DE WITT, J.—It is not often that as full and elaborate findings of fact are made in a case as those now before us. The trial involved volumes of figures and days of testimony upon questions of fact. The findings treated all these questions of accounts, and the jury gave mathematical results which would lead one to believe that they were found by a “struck jury” of accountants.

Since the case was argued in this court we have spent many days in reviewing the testimony. We would have been aided by specifications of alleged errors of a different character than those contained in the statement on motion for a new trial in this case. We do not purpose to disregard the specifications, or to hold that they are insufficient. We express no opinion upon that subject. But, when a specification is stated as follows: “There is no evidence to sustain finding No. 2, that,”—then giving a statement of the finding, and when every specification is similar to this instance cited, it is a great labor for a court to go through 800 pages of record to ascertain whether it is true that there is no evidence to sustain any of the findings. When a case has been tried for 21 days, before a court of general jurisdiction, producing such a record as this before us, and findings are made and adopted by the court, there would seem to be some presumption that some evidence had been introduced in the case tending to support the findings. But, notwithstanding the form of the specifications, we have read the testimony, and examined it with great diligence. We are prepared to say that there is evidence to sustain the findings. Having satisfied our own minds to that effect, we see no profit in giving in this opinion a review of the testimony. It would not be valuable as a precedent. The case was tried at great length before “a jury of unusual intelligence.” The two learned judges of the district court pre-

sided at the trial and adopted the findings. The testimony was to a great extent of a technical character, and as to mercantile accounts, transactions, and facts, upon which subjects a jury of intelligent business men are perhaps as competent to form a judgment upon the facts as is a court that has not heard the witnesses testify, or observed their demeanor.

The great issue in this case was fraud. The existence of fraud was determined by an overwhelming line of findings by the jury. See statement of the case preceding this opinion. Fraud cannot often be proven by direct evidence. Fraud conceals itself. It does not move upon the surface in straight lines. It goes in devious ways. We may with difficulty know "whence it cometh and whither it goeth." It "loveth darkness rather than light, because its deeds are evil." It is rarely that we can lay our hand upon it in its going. We are more likely to discover it at its destination, before we know that it has started upon its sinuous course. When we so discover it, the search light of a judicial investigation goes back over its trail and lightens it from beginning to end. As the woodsman follows his game by slight indications, as a broken twig or a displaced pebble, so fraud may become apparent by innumerable circumstances, individually trivial, perhaps, but in their mass "confirmation strong as proofs of holy writ." The weight of isolated items tending to show fraud may be "as light as the shadow of drifting snow," but the drifting snow in time makes the drift, the avalanche, the glacier. Fraud may hang over the history of the acts of a man like the leaden-hued atmosphere upon the house of Usher, "faintly discernible but pestilent, an atmosphere which has no affinity with the air of Heaven." Under this atmospheric pressure of fraud the jury in this case lived and breathed for the 21 days of the trial. We have followed them through the history of those days, as it is transmitted to this court in the record. We have not the advantage of breathing and seeing and hearing which they had. The district court had that advantage, and agreed with the findings of the jury. We are of opinion that, under

these circumstances, the evidence is not so insufficient that we should disturb the result.

In accordance with our views as to the proof of fraud, we note the following from Bump on Fraudulent Conveyances (page 759): "In questions of fraud a wide range of evidence is allowed. Fraud assumes many shapes, disguises, and subterfuges, and is generally so secretly hatched that it can only be detected by a consideration of facts and circumstances which are not unfrequently trivial, remote, and disconnected. To interpret their meaning, or the full meaning of any one of them, it may be necessary to bring them together and contemplate them all in one view. In order to do this it is necessary to pick up one here and another there until the collection is complete. A wide latitude of evidence is therefore allowed, in order that fraud may be detected and exposed."

We will add, here, however, that the testimony as to fraud in the conveyances by Greenhood to Barnett and Weil, and the testimony as to the participation in the fraud by Kahn, assignee, is not wholly satisfactory to our minds. But it seems to have satisfied the jury. They saw Greenhood, and Barnett, and Weil, and Kahn, and heard them testify. We have not. In view of the whole case, we do not feel called upon to disturb these findings.

It was held in *Ming v. Truett*, 1 Mont. 322, that the court will not reverse a judgment if the testimony is conflicting, even though the weight of evidence appears to be against the findings of the court below. This court will not disturb the findings or verdict, if there is substantial evidence to support the same, even though the evidence is conflicting. (*Lincoln v. Rodgers*, 1 Mont. 217; *Travis v. McCormick*, Id. 347; *Davis v. Blume*, Id. 463; *Griswold v. Boley*, Id. 545; *Kinna v. Horn*, Id. 597; *Toombs v. Hornbuckle*, Id. 286; *Kleinschmidt v. Dunphy*, Id. 124; *Parchen v. Peck*, 2 Mont. 570; *Vantilburgh v. Hamilton*, Id. 413; *Orr v. Haskell*, Id. 225; *Knox v. Gerhauser*, 3 Mont. 276; *Story v. Black*, 5 Mont. 26; *Railway Co. v. Warren*, 6 Mont. 275; *Beck v. Beck*, 6 Mont. 285; *Ramsey v. Cattle Co.*, 6 Mont. 501; *Budd v. Perkins*, 6 Mont.

223; *Diamond v. Northern Pacific R. Co.*, 6 Mont. 586; *Territory v. Reuss*, 5 Mont. 607; *Kennon v. Gilmer*, 5 Mont. 273, Id., 9 Mont. 110; *Frank v. Murray*, 7 Mont. 4; *Ingalls v. Austin*, 8 Mont. 333; *Fitschen v. Thomas*, 9 Mont. 52.) These are some of the older cases decided by this court under the territorial government. The same rule has obtained under the state organization.

It was said in the recent case of *Brownfield v. Bier*, 15 Mont. 403: "When there is a substantial conflict in the evidence, and that conflict has been resolved by the district court, and the district court has denied a motion for a new trial, this court will not disturb the result. This doctrine has been so persistently announced by this court for 26 years that it may be considered as the settled rule in this jurisdiction." The decisions of this court from its organization to the present time are full declarations of this principle of practice. We shall, therefore, accept the findings as made, and proceed to the discussion of the questions of law presented by the appellants.

The assignment for the benefit of creditors was made February 12, 1892, plaintiff here being the third preferred creditor. On February 13th this plaintiff commenced an action against Greenwood, Bohm & Co. on a money demand for \$33,500. A writ of attachment was issued, and levy made by the sheriff February 15th. On April 8th a judgment was rendered for plaintiff in that case for \$35,945.48. On February 24th Max Kahn, assignee, began an action against the sheriff (Jefferis) and the plaintiff herein, for the conversion of the goods seized under the writ issued in the case of *Merchants' National Bank v. Greenwood, Bohm & Co.* The defendants in that action of Kahn against Jefferis and the bank justified in their answer under the writ of attachment. Replication was filed, issue made, and the case was ready for trial before the issues in the case now before us were made up. This case now before us was commenced April 21st. It and the case of Kahn against Jefferis and the bank were set for trial for the same day. In this case the issue was fraud in the

assignment, and all the parties were before the court,—the bank, the assignors, and the assignee. In *Kahn v. Jefferis et al.* there was a legal cause of action and the equitable defense of fraud in the assignment; but in that case Greenhood and Bohm were not parties, and were not before the court. The court determined that the whole matter could be more fully tried in the action in which it found all the parties. For that reason it tried this case prior to that of *Kahn v. Jefferis et al.* An elaborate argument was made in this court, counsel contending that this action of the district court was error. But we need not follow the counsel into that argument, for the reason that they have strayed far from the point decided by the district court. To ascertain that point we quote as follows from the record: “That thereafter, on the 16th day of January, 1893, this cause coming on for trial, the defendants objected to said cause being tried at said time, for the reason that the case of *Max Kahn v. C. M. Jefferis and Merchants' National Bank* preceded it upon the calendar, and should be tried first in its order.” It thus appears that the only objection which the defendants made to the trial of this case prior to the case of *Kahn* against *Jefferis* and the bank was that the *Kahn* case preceded this case upon the docket, and for that reason should be tried first. The counsel, upon the argument before us, stated that they abandoned that point, and conceded that the court had the right to control its own docket and the order in which it may try cases. As this is the only point presented in the objection to the district court, there is nothing else for us to pass upon, and we are disappointed in not being able to accompany counsel in their diligent and learned research into the questions not raised by the record.

Before proceeding to examine what we consider the important question of law in this case, there are a few small matters which may be cleared up *in limine*.

Two matters which were relied upon in the complaint are abandoned by the respondent, namely, the question of *Rejall's* partnership in the firm of Greenhood, Bohm & Co., and also the question of the laws of the state of Washington. The al-

leged insufficiency in the description of the property assigned is also a matter which is not relied upon, and, furthermore, seems to be settled by the decision of *McCulloch v. Price*, 14 Mont. 320. Again, on the question of the preferences to Rejall and Westheimer and Bach, Cory & Co. being in excess of the amount actually due them, it was found by the jury that they were in good faith, and this is not a subject upon which the court below rendered its judgment. These matters have all, therefore, been passed.

That which we consider the important question in this case is what the appellants call the want of equity in plaintiff's cause of action. The appellants contend that facts are not pleaded or found which entitle the plaintiff to the equitable relief demanded in its complaint and granted by the court. The plaintiff bank was a large creditor of Greenhood, Bohm & Co. Greenhood, Bohm & Co. made the assignment. The following day the bank brought the action at law hereinbefore described against Greenhood, Bohm & Co., and levied an attachment upon the assigned goods. When the bank obtained its judgment in that cause it found this situation: It had a large quantity of goods attached. These goods were included in the assignment, which the bank claimed was fraudulent. The assignee was asserting the right of possession to the goods, and, furthermore, had brought an action against the sheriff and the bank for the alleged conversion of these goods. The bank in its money-demand suit issued an execution. The sheriff, with the execution in his hands, found this condition of affairs which we have detailed. He returned the execution in the following language: "No property to be found in my county to satisfy the foregoing execution, except the property attached herein, and embraced in the alleged assignment from Greenhood, Bohm & Co. to Max Kahn on the 12th day of February, 1892, and except the above garnishments, and I herewith return the said execution unsatisfied." There is no point made as to the garnishments mentioned in the sheriff's return, as they were in trifling amounts. The plaintiff in the law case, to wit, the bank, then commenced this equity action, which resulted in the find-

ings and judgment recited in the statement preceding this opinion. Does the plaintiff thus appear to be entitled to equitable relief? This is the vital question in the case, and the one around which the battle has been waged.

This is not the sort of a creditors' bill which seeks the discovery of assets or equitable interests not subject to levy and sale. It is, on the other hand, an action to set aside a fraudulent obstruction to plaintiff's realizing fully and successfully upon its judgment.

The counsel for appellants cite innumerable authorities upon the principle that the legal remedy must be first exhausted, and that execution must be returned *nulla bona*. Here the execution was not returned *nulla bona*, but it returned the facts, to wit, the existence of the fraudulent obstruction to the execution. We find that the authorities sustain the bringing of an equitable action under circumstances similar to those of the case at bar. In this case, judgment was obtained at law by the plaintiff before it brought this suit. The plaintiff was therefore in a position of a judgment creditor with a liquidated demand. The authorities to the effect that the creditors' bill cannot be brought until judgment is obtained are therefore not applicable. The resort to equity in this case was not a resort to simply aid an attachment, although some cases hold that even a simple attachment without judgment may be aided by creditors' bill. (Pom. Eq. Jur. §415, note on page 125.) As noted before, the action is to remove a fraudulent obstruction, and was brought after the judgment at law was obtained. We are of the opinion that the weight of the better authority is in favor of sustaining such action. The contention over this point has been so earnest and persistent, that we shall proceed to quote from the authorities with some liberality.

We make the following quotations: "The jurisdiction of equity to entertain suits in aid of creditors undoubtedly had its origin in the narrowness of the common-law remedies by writs of execution. These writs, issued by courts of common law, besides being otherwise limited in their operations, were of course confined to those estates and interests recognized by

the law, and did not extend to estates and interests equitable in their nature. Creditors' suits were therefore permitted to be brought in those instances where the relief by execution at common law was ineffectual,—as for a discovery of assets, to reach equitable and other interests not subject to levy and sale at law, and to set aside fraudulent conveyances and obstructions. Statutes in England and in certain American states have greatly extended the scope of writs of execution, thereby providing for adequate legal relief in cases where, formerly, resort to equity was necessary, and even extending the relief to instances where, perhaps, a creditors' bill would not lie. In other states, statutes have increased the efficiency of creditors' suits by dealing with the subject directly. It is a necessary result from the whole theory of the creditors' suits that jurisdiction in equity will not be entertained where there is a remedy at law. The general rule is, therefore, that a judgment must be obtained, and certain steps taken towards enforcing or perfecting such judgment, before a party is entitled to institute a suit of this character. In this there is a uniformity of opinion, but the difficulty arises in determining exactly how far a plaintiff should proceed after he has obtained his judgment. It is, of course, necessary for the creditor to allege and prove that he has taken the necessary proceedings at law before he can show a case requiring the interposition of equity. Whether an equitable suit, analogous to the creditor's suit, will be allowed in aid of the lien created by an attachment before the recovery of judgment, is a question to which the American courts have given directly conflicting answers." (3 Pomeroy's Equity Jurisprudence, § 1415.) This case at bar is one of those described by Pomeroy as one "to set aside fraudulent conveyances and obstructions." See the authorities cited to this text in note 3.

We find the following in 2 Beach on Modern Equity, §§ 883, 885. Section 883: "A court of equity will aid a judgment creditor to reach the property of his debtor by removing fraudulent judgments or conveyances or transfers which defeat his legal remedy at law, and will also aid him where the

debtor's property consists of choses in action and mere equitable interests not liable to be sold on execution; and where a debtor transfers his property in fraud of creditors, an injunction may be granted as incidental to the relief sought by the creditors' bill, and will, if necessary, grant him a double relief under one bill by removing the fraudulent obstruction in the way of his execution, and also at the same time enabling him to reach his debtor's equitable assets. If, when the bill was filed and execution returned unsatisfied, there was property within the creditor's knowledge subject to levy on execution the bill cannot be sustained." Section 885: "A creditors' bill may be entertained if the legal remedy is not in all respects as plain and satisfactory as that afforded by equity. For example: a bill may often afford a better remedy than a garnishment against a fraudulent transferee, because on recovery a court of equity would be the more appropriate forum for distributing the fund among numerous claimants." Note 1: "Thus in *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, it was said: 'It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'"

It seems to us quite clear in this case that the remedy at law was not at all as practical and efficient as the remedy in equity. In the money-demand action of the bank against Greenhood, Bohm & Co., the assignee, Max Kahn, was not a party, and in the action for a conversion by Kahn against Jefferis and the bank, Greenhood and Bohm were not parties; but in the case at bar every one was before the court, and the rights of every one could be finally determined.

We find the following pertinent remarks in 2 Freeman on Executions, § 424: "The objects which may be accomplished by proceedings in equity to obtain satisfaction of a judgment at law are three: (1) A full and complete discovery may be obtained of all the defendant's assets, and when discovered they may be compelled to contribute to the payment of the plaintiff's judgment. (2) Equitable and various other assets,

not subject to levy and sale at law, may be sold under the direction of chancery, and the proceeds applied to the payment of the plaintiff's debt. (3) Various obstructions may be removed from property liable to seizure and sale at law, and by their removal the plaintiff's legal remedy may be made far more certain and efficient than it would otherwise be. (4) The complainant may, in effect, assert for his benefit a cause of action existing in favor of the judgment debtor, and which the latter neglects or refuses to assert. Under the third subdivision fall that numerous class of cases in which property has been made the subject of liens and transfers made to defraud creditors. In such a case, the creditors may proceed to levy and sell as if no such lien or transfer existed. Their remedy at law is nevertheless seriously obstructed, because few persons can be found willing to purchase property at execution sales, and take upon themselves the burden and the risk of contesting with adverse claimants. A creditor is therefore allowed to go into equity to test the validity of claims which interfere with his rights, and which he believes to be founded in fraud. Upon a proper showing, equity will remove a fraudulent transfer, or mortgage, or judgment, or other lien, or clear away a cloud from the title. * * * While fraud is a more frequent ground for the removal of obstructions than any other, it is not an indispensable ground. The mere fact that there is an apparent obstruction calculated 'to inspire doubt and apprehension in the mind of purchasers, and thus prevent them from bidding upon the property,' is generally sufficient to warrant equity in decreeing its removal. * * * Whatever may be requisite to prevent the plaintiff's suit from proving abortive will generally be done, provided it is not beyond the relief which equity is competent to extend. Very frequently the property sought to be reached by the bill is taken into the possession of the court, and a receiver appointed for its protection and management. Usually there is great danger that the property sought to be reached by the bill will be transferred by the defendant to some third person, or will by some other means be placed in a situation where it will be either

difficult or impossible to make it answerable to the decree which may ultimately be entered in the case. Hence, it is usual, at or very soon after the filing of the bill, to obtain an injunction to prevent the defendant from making any disposition of his property which would tend to make the suit ineffectual. While the necessity of an injunction against a transfer of the defendant's property may be more frequent and obvious than any other, yet this is by no means the only occasion for the use of this preventive relief in connection with creditors' suits. Whatever may be the wrong threatened, if it be of such a character that its perpetration will render the suit wholly or partly ineffectual, as in case of the removal or destruction of the property, an injunction will issue. If a fraudulent obstruction has been interposed to hinder or delay the plaintiff at law, he sometimes does not ask equity to do anything beyond removing such obstruction, for when it is removed the plaintiff may safely proceed at law under his execution. But the more usual practice, both in proceedings to remove fraudulent obstructions, and in proceedings to reach property not subject to execution at law, is to obtain the appointment of a receiver, and thereby bring the property within the custody and control of the court. If the property consists of real estate, the defendants are required to execute a conveyance to the receiver. If it consists of personalty, the title vests in him by virtue of his appointment. After he has been vested with the title, the receiver collects, manages, and disposes of the property as directed by the orders and decrees of the court; and the plaintiff, when entitled thereto, obtains satisfaction out of the funds realized by the receiver." The practice as suggested in *Freeman* is that which was observed in this case. A receiver was appointed, who collected and disposed of the property and retains the proceeds thereof subject to the judgment of the court.

We note the following from *Tappan v. Evans*, 11 N. H. 327: "The general principle, deducible from the authorities applicable to this case, is that where property is subject to execution, and a creditor seeks to have a fraudulent convey-

ance or obstruction to a levy or sale removed, he may file a bill as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution. But if the property is not subject to levy or sale, or if the creditor has obtained no lien, he must show his remedy at law exhausted, by an actual return upon his execution that no goods or estate can be found (which is pursuing his remedy at law to every available extent), before he can file a bill to reach the equitable property of the debtor. (*McDermott v. Strong*, 4 Johns. Ch. 687; *Williams v. Brown*, Id. 682; *Brinckerhoff v. Brown*, Id. 676; *Spader v. Davis*, 5 Johns. Ch. 280; *Beck v. Burdett*, 1 Paige 305; *Child v. Brace*, 4 Paige 310; *Dodge v. Griswold*, 8 N. H. 425; *Hadden v. Spader*, 20 Johns. 554; *Weed v. Pierce*, 9 Cow. 722; *McElwain v. Willis*, 9 Wend. 548, 560, 561, 566.) The same principle seems to be recognized in North Carolina and Kentucky. See cases cited in 1 Ben. & H. Dig. 348, 353." In addition to the remarks made in the New Hampshire case just cited, it is always to be remembered that, in the case at bar, we have not only the attachment but the judgment and the return of the execution stating the facts of the obstruction.

We find the following language in the case of *Tuck v. Olds* in the United States circuit court for the state of Michigan, 29 Fed. 738: "But while I do not think the bill could be sustained on this ground, still I think it may be as one filed to remove an obstruction to the execution. * * * The principle upon which this class of creditors' bills rests is that the defendant, by some inequitable proceeding, has put an obstruction in the way of complainant's realizing his just satisfaction out of the property of the defendant levied on. The obstruction must be one calculated to inspire doubt and apprehension in the minds of purchasers, and thus prevent them from bidding upon the property, whereby the process is paralyzed. In such a case the complainant has no adequate remedy at law. (*Beck v. Burdett*, 1 Paige 305; *Jones v. Green*, 1 Wall. 330; *Thayer v. Swift*, Har. (Mich.) 430, 433."

In an old case in New York, in 1829, Chancellor Walworth says: "There are two classes of cases where a plaintiff is permitted to come into this court for relief, after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt. In one case the issuing of the execution gives to the plaintiff a lien upon the property, but he is compelled to come here for the purpose of removing some obstruction, fraudulently or inequitably interposed to prevent a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt out of property of the defendant, which cannot be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies, without being able to obtain satisfaction of his judgment. In the first case, the plaintiff may come into this court for relief, immediately after he has obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same is situated; and, the obstruction being removed, he may proceed to enforce the execution by a sale of the property, although an actual levy is probably necessary to enable him to hold the property against other execution creditors or *bona fide* purchasers. *Angell v. Draper*, 1 Vern. 399, and *Shirley v. Watts*, 3 Atk. 200, are cases of this description. In the first, a fraudulent assignment was interposed to prevent a sale of the defendant's property on execution; and in the last case it became necessary to redeem a term of years in a leasehold property from a lien of a prior mortgage. In both these cases the plaintiffs were allowed to come into equity for relief before the executions were returned unsatisfied." (*Beck v. Burdett*, 1 Paige 305.)

In the United States circuit court of Missouri, we have the following: "The general rule of equity, as contended for by respondents, is that before the general creditor can resort to a court of equity to reach his debtor's property held under a fraudulent deed and the like, he must reduce his claim to judgment, issue execution, and have a return of *nulla bona*. In other words, he must exhaust his legal remedies. The reason

of this rule, requiring a judgment, etc., is that the claim must be rendered certain; otherwise, the proceeding to vacate the fraudulent transfer of the title, and to remove obstacles placed in the way of the successful operation of the execution, might be entirely fruitless if, after all, the debtor failed to obtain a judgment on his claim. * * * Where the reason of the rule ceases, the rule itself ought not longer to operate. In this case the claim was not only certain, but it had back of it a judgment conclusive and binding, and, under the law of the forum where the attachment suit was instituted, the complainant had secured and fixed his lien upon the real estate. Why should it, then, be compelled to proceed to execution, when all the purchaser could obtain by a sale thereunder would be a lawsuit, before he could get rid of the legal title of the respondents?" (*Chicago & A. Bridge Co. v. Anglo-American Packing and Provision Co.*, 46 Fed. 584.)

We quote as follows from the supreme court of New Hampshire "The object of the plaintiff's bill, although somewhat inartificially drawn, was clearly twofold: First, to remove out of the way of the levy of the Waldron execution, belonging to the plaintiff, all fraudulent mortgages and conveyances of William H. Sheafe's interest in the Jacob Sheafe farm; and, secondly, to obtain from the court a decree which should secure to the plaintiff a lien upon that interest for the payment of the sums due and to become due to her annually as alimony, under the decree of the superior court, July term, 1852, ordering said William H. Sheafe to pay her the sum of \$150 per annum for that purpose. In the opinion delivered in this case at the adjourned term in March last, we recognize the validity of plaintiff's claim for relief on both these grounds. Upon the first point we remarked: 'The general principle deducible from the authorities seems to be that, where property is subject to execution and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale set aside or removed, he may file and maintain a bill for that purpose as soon as he has obtained a specific lien upon the property, whether by attachment, judgment, or the issuing of an execu-

tion.' (*Tappan v. Evans*, 11 N. H. 327, and cases cited; *Iron Co. v. Goodall*, 39 N. H. 223.)" *Sheafe v. Sheafe*, 40 N. H. 517.

The New Jersey court of chancery expresses the following view: "But all the cases proceed upon the principle that the judgment creditor, in order to be entitled to the aid of a court of equity in enforcing his remedy by removing obstructions from his path, must have acquired title to or a lien upon the specific thing against which he seeks to enforce his judgment. He must complete his title at law before coming into equity. Unless he has established his title to or lien upon the property of his debtor, he has no right to interfere with his debtor's disposition of it. Such lien the creditor does acquire under our law by the service of the writ of attachment. The law recognizes the claim of the attaching creditor after it has been verified by affidavit as prescribed by the statute, as a subsisting debt, for the purpose of creating the lien. Having that lien by authority of the statute, prior to the recovery of judgment, he is entitled to the aid of a court of equity to enforce his legal right. The statute for various purposes recognizes and enforces this right, although it may be that the claim may eventually prove to be unfounded. The objection to the interference of a court of equity, that the claim of the attaching creditor is not ascertained, if it be entitled to any consideration, can have no application in the present case, for the plaintiff's claims against the defendant have in fact been established by judgment." (*Robert v. Hodges*, 16 N. J. Eq. 304.)

A decision which is often quoted is that of the case of *Case v. Beauford*, 101 U. S. 688, in which the court says: "It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted. And, generally, it must be averred that judgment has been recovered for the debt, that execution has been issued, and that it has been returned *nulla bona*. The reason is that, until such a showing is made, it does not appear in most cases that resort to a court of equity is necessary, or, in other words, that the

creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court of equity will not entertain a case for relief where the complaint has an adequate legal remedy. The complaining party must, therefore, show that he has done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form. '*Bona sed impossibilia non cogit lex.*' It has been decided that, where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. (*Turner v. Adams*, 46 Mo. 95; *Postlewait v. Howes*, 3 Iowa 365; *Ticonic Bank v. Harvey*, 16 Iowa 141; *Botsford v. Beers*, 11 Conn. 569; *Payne v. Sheldon*, 63 Barb. 169.) This is certainly true where the creditor has a lien or a trust in his favor. So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him. (*Thurmond v. Reese*, 3 Ga. 449; *Cornell v. Radway*, 22 Wis. 260; *Sanderson v. Stockdale*, 11 Md. 563.) * * * The foundation upon which these and many similar cases rest is that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. * * * But, without pursuing this subject further, it may be said that, whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. (*Tappan v. Evans*, 11 N. H. 311; *Holt v. Bancroft*, 30 Ala. 193.) In-

deed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a court of equity can be asked to set aside fraudulent dispositions of a debtor's property, the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference."

Upon the argument of this case our attention was called to an alleged conflict in the decisions from the court of appeals of New York, counsel citing *Thurber v. Blanck*, 50 N. Y. 80, and *Mechanics', etc., Bank v. Dakin*, 51 N. Y. 519; but the recent case of *People ex rel. Cauffman v. Van Buren* discusses these cases and states the doctrine as follows:

"In *Thurber v. Blanck*, 50 N. Y. 80, it was held that an attaching creditor had no standing in court to reach equitable assets until his remedy at law was exhausted, nor to attack a fraudulent transfer of the property of his debtor until after judgment; and in *Mechanics', etc., Bank v. Dakin*, 51 N. Y. 519, the commission of appeals held that an attaching creditor, after the recovery of judgment and the issuing of execution, may maintain an equitable action in his own name to set aside a fraudulent transfer of the property which had been seized under the attachment. The impression seems to have prevailed that there was an irreconcilable conflict between these two cases, and the reporter, in a foot note in 51 N. Y., says: 'This case, it will be perceived, was argued prior to the decision of the case of *Thurber v. Blanck*, 50 N. Y. 80, with which it is in conflict. That case had not been brought to the attention of the commission at the time of the decision herein.' But we fail to discover any real ground of antagonism between them. In *Thurber v. Blanck* the court was dealing with an attempt on the part of an attaching creditor to reach equitable assets, which it has been uniformly held cannot be done until judgment has been recovered, execution issued and returned unsat-

ified, and an action or proceeding in the nature of a creditors' bill instituted. The provisions of the Revised Statutes (now §§ 1871-1879 of the Code) which authorized a judgment creditors' action, imperatively required the recovery of a judgment and the issue and return of an execution unsatisfied as an indispensable condition of the creditor's right to bring the action.

"In *Mechanics', etc., Bank v. Dakin*, the attaching creditor had, by the recovery of judgment and the issue of execution, acquired the right to have the attached property applied to the satisfaction of the execution, but in the assertion of this right he found the way obstructed by the interposition of a conveyance of the property by his debtor, which was apparently valid but which was in fact void. In such cases it has always been held that, while the process for the collection of the debt was outstanding, the equitable jurisdiction of the court could be invoked to remove the fraudulent obstruction to the legal process and permit it to be effectually enforced." (136 N. Y. 259, 32 N. E. 775.)

Counsel for appellants have relied, among other cases, upon *Buckeye Engine Co. v. Donau Brewing Co.*, 47 Fed. 6. That case seems to have decided that a creditors' bill cannot be maintained upon a judgment on which execution was issued and returned unsatisfied, when the return does not expressly show that there was no property subject to levy. But that decision is not in conflict with the principles announced in the above-quoted cases. As we have tried to make clear throughout this discussion, this is not the sort of a creditors' action where the showing that there was no property subject to execution was of great importance, when the return in fact showed the existence of the obstruction which the creditors wished to have removed. It is even held in the state of Washington that the obtaining of judgment is not a prerequisite to equitable interference. Of course, we are not required to go that far in this case, and we mention the Washington case only to show the tendency, perhaps, to extend equitable aid. The Washington court uses the following language: "The first questio

that presents itself in this case is, is it necessary to reduce a claim to judgment, issue an execution and secure a return of *nulla bona* made thereon, to support a creditors' bill, or is an attachment lien a sufficient basis for such an action? Many cases have been cited both by appellant and respondents on this proposition, and from an investigation of the cases it must be conceded that the weight of opinion, considering both the old cases and the new, sustains the doctrine that the claimant must press his claim to judgment, send out his execution, and show a fruitless search for property before he can appeal to a court of equity to set aside a fraudulent conveyance. But we are satisfied that the trend of modern decision is the other way. At all events, the decisions of courts are so conflicting that this court feels justified in adopting that rule which seems to it best calculated to protect the interests of *bona fide* creditors from fraudulent transactions. We think no good purpose can be subserved by compelling a creditor to await his judgment, but that the effect will be to aid dishonest debtors in fraudulently disposing of their property. And, especially in view of the language used by the supreme court of the territory in *Meacham Arms Co. v. Swartz*, 2 Wash. T. 412, 7 Pac. 859, and *Thompson v. Caton*, 3 Wash. T. 31, 13 Pac. 185, we feel justified in now deciding that, where a lien has been obtained by attachment on the property in controversy, and it appears by bill that the debtor is insolvent, and the issuing of an execution would be of no practical utility, the obtaining of the judgment and the issuance of an execution thereon is not a necessary prerequisite to equitable interference." (*Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 852.) See, also, *Williams v. Michenor*, 11 N. J. Eq. 520.

As looking in the direction of the authorities above quoted, we cite as follows from *Leopold v. Silverman* 7 Mont. 266: "The most important one of the incidental questions presented in the record is this: Should the judgment on the pleadings have been rendered in favor of the defendants because the plaintiffs had a plain, speedy, and adequate remedy at law? Let us first inquire whether or not the plaintiffs had such a le-

gal remedy. If both the first and second mortgages are void on their face, as is alleged in the plaintiff's pleadings, there can be no doubt that they had a remedy at law by an action of claim and delivery under our statute for the possession of the property. But does this fact preclude them from bringing a suit in equity to set aside the prior mortgages for fraud, and to foreclose the subsequent mortgage, and, incidentally, of course, to have a receiver to preserve and dispose of the property and distribute the proceeds under the direction of the court? In states where the two jurisdictions of law and chancery are strictly separated, and relief is administered in different courts or by the same court sitting in different capacities, this question might be answered in the affirmative. But in the territories of the United States there is only one court to try all causes, whether legal or equitable, and the blended system prevails to its fullest extent as established by acts of congress."

Innumerable other cases might be cited. Those from which we have quoted seem to be representative, and state the doctrine clearly and satisfactorily. As heretofore observed, the appellants have cited many authorities upon the subject of creditors' bills, but those cases treat of facts different from those in the case at bar, and of creditors' bills of a nature other than that set up in this complaint. We are perfectly satisfied that, under modern views of equity jurisprudence, the action will lie to remove a fraudulent obstruction to the reasonable success of plaintiff in realizing upon its attachment lien when it has reduced its claim to judgment and it appears that the said obstruction to the fairly successful execution of judgment exists. We are of the opinion that it would not be reasonable or equitable for a court of chancery to turn away such a plaintiff, and require it to go to its remedy at law and sell property and to breed a swarm of actions, some of which would later have to be finally settled in equity, when this one action may finally dispose of all of the contentions. There may be cases which hold views contrary to those which we have expressed. We do not purpose to review those cases.

We have satisfied our own mind upon the conclusions which we have reached, both in reason and upon authority.

It is argued by appellants that, by issuing an execution and its being returned unsatisfied, the plaintiff abandoned its attachment lien. The district court, upon this subject said: "This contention impresses us as somewhat frivolous. In the whole litigation nothing is clearer than the fact that the plaintiff has clung with the utmost tenacity to this lien, both as a matter of intent, and from a legal standpoint." We, also, are of the opinion that this contention of the appellant is not substantial. If it is argued that the respondent abandoned its attachment lien as a matter of fact, this is not true. Abandonment is a question of intent. Intent is ordinarily proved by acts. The acts of respondent certainly indicate that it was far from abandoning the attachment lien. It issued an execution, which execution at once encountered a fraudulent obstruction. Instead of abandoning the attachment in fact, the respondent at once came into the court of equity to render more completely available its attachment lien. If it be contended that the respondent by its acts abandoned, as a matter of law, the attachment lien, the contention is settled by the views which we have heretofore expressed, in treating of the subject, as the appellants call it, of the alleged want of equity in the case. As to the return of the execution, it stated the exact facts, and the facts as we have determined, upon which the equity action may rest. Upon the contention that the attachment lien was abandoned, see the case of *People ex rel Cauffman v. Van Buren*, 136 N. Y. 259, in which the court says, on page 260: "It would seem to be illogical to accord to the plaintiff the right to attach property fraudulently transferred, as he concededly may under the decisions in *Hall v. Stryker*, 27 N. Y. 596, and the other cases cited above, and yet deny him the right to have the lien preserved until he can merge his claim in a judgment and issue final process for its collection. No adequate remedy at law can be suggested in such a case."

Again, the appellants contend that, if the assignment is to be set aside in this action, the only judgment proper to render

would be one marshaling the assets and requiring all the creditors to come in and prove their claims, to the end that they might share *pro rata* in the funds, and that the plaintiff has no lien prior to any of the creditors. The appellants claim that the judgment should therefore be modified. But they make this claim upon the ground that the respondent abandoned its attachment lien. That point we have already decided against them, and with that falls also their contention that the judgment should be modified. This is not a case where the plaintiff claims a priority because it first brought its suit to discover assets. We think that we have heretofore made it plain that that is not the nature of the action, but, on the other hand, it is an action to remove the fraudulent obstruction.

The appellants allege error in the action of the court in allowing testimony as to statements made by the assignors some days after the assignment was executed, and after possession had been delivered to the assignee. We shall not approve or disapprove the ruling of the court in this respect. It is important to observe what was the character of this testimony, and what was its materiality, in order to ascertain whether this error, if error it were, was sufficiently prejudicial to reverse the case. L. H. Hershfield, president of the plaintiff bank, was first interrogated as to conversations preceding the assignment. He was then allowed to testify as to conversations between Greenhood and Bohm and himself after the assignment. His testimony in this respect was as follows: "I objected to their assignment, and they said they did the best they could, and in that line evidently they had no use for me. They said they were disappointed in the action that had been taken, that they were in hopes that they could borrow from Rejall \$40,000 or \$50,000, and make a settlement with their creditors, and that the course that we had pursued had prevented them from doing so; that they thought they could settle with preferred creditors at 50 cents on the dollar, and with the other creditors at 25 cents. I asked them where they wanted to get the money, and they said from Rejall,—that Rejall would give them the money." This evidence does not seem to us to be

particularly substantial. It does not necessarily seem to be indicative of fraud that the assignors hoped to make a settlement with their creditors by borrowing money to do so.

There may have been fraud in their plans in this respect, but the bare fact of their hoping to borrow money to make a settlement we do not think, in itself, particularly tends to indicate a fraudulent intent in making the assignment. While this testimony may be incompetent and immaterial, it does not seem to us to have been of such a substantial character that the whole case should be reversed upon this ground.

Upon this point we append the following quotations: "It then remains to be seen whether there was any such error in the decision of the judge who tried these issues, as to render it proper to grant a new trial. And here it may be proper to observe that the principles upon which this court directs a new trial of a feigned issue are somewhat different from those which govern courts of law in granting new trials. Where this court directs an action, although accompanied by particular directions, the parties in other respects are left to their legal rights. The application for a new trial is in that case to be made to the court in which the action is brought, and is subject to the rules which govern the proceedings of that court in other cases. But if an issue is directed, it is to inform the conscience of the chancellor, and the application for a new trial must be made here. (*Carstairs v. Stein*, 2 Rose 178; *Fowkes v. Chadd*, 2 Dickens 576; *Ex parte Kensington*, Coop. 96.) In the latter case this court will not grant a new trial merely on the ground that the judge received improper testimony on the trial of the issue, or that he rejected that which was proper, if, on the whole facts and circumstances, the chancellor is satisfied the result ought not to have been different if such testimony had been rejected in the one case or received in the other. *Head v. Head*, 1 Sim. & S. 150; same case on appeal, Turn. & R. 142; *Barker v. Ray*, 2 Russ. 63; *Collins v. Hare*, 1 Dow & C. 139, per Lord Lyndhurst." (*Apthorp v. Comstock*, 2 Paige 487.) "The lord chancellor then observed, upon the doctrine of courts of equity as to new trials, that if evidence which ought

to have been received has been refused, or evidence which ought to have been refused has been admitted, or if, in some instances, the judge can be shown to have miscarried in his directions to the jury, the court will not grant a new trial, if, looking at the whole evidence before the jury and the address of the judge to the jury, its own conscience is satisfied." (*Head v. Head*, 1 Turn. & R. 141.)

"On the appeal to the general term from the original judgment, the order to be made would depend upon the extent to which, in the opinion of the court, errors had affected that judgment. If errors had been committed on the trial of the issues ordered to be tried by a jury, which so affected the result that the court was not willing to proceed to judgment thereon, a new trial would be necessary. But we apprehend that the court was not required to grant a new trial merely because it found on the record some exceptions which were well taken, if satisfied upon the whole case that justice had been done. This case, on the part of the defendant, upon the former appeal to the general term, and on the present appeal, has been treated and considered as though exceptions, if well taken, were to have the effect of reversing the judgment, however technical or unimportant to the general result they may be. Such effect was not given to mere errors on the trial of a feigned issue out of chancery, and it is not apparent that the Code has introduced a new rule on the subject. (*Forrest v. Forrest*, 6 Duer 138, 139; *Barker v. Ray*, 2 Russ. 63; *Lyles v. Lyles*, 1 Hill Eq. 82; *Mulock v. Mulock*, 1 Edw. Ch. 14, and cases cited; *Apthorp v. Comstock*, 2 Paige 482, and cases cited.) And the observation, gathered from these cases, that the trial of issues, and much more the proceedings on reference, being to inform the conscience of the court, even the rejection of competent testimony or the admission of incompetent evidence does not necessarily require the court to set aside the proceedings or grant a new trial, may properly be borne in mind in considering the objections heretofore to be noticed." (*Forrest v. Forrest*, 8 Bosw. 653.)

"It was insisted that the same principles upon which a court

of law formerly proceeded in granting or refusing a new trial should be applied to the case; and if evidence had been rejected on the trial of the issues that ought to have been received, or evidence received that should have been rejected, the defendant was entitled to a new trial. This is hardly the rule now in a court of law, for, latterly, even these courts undertake to judge for themselves of the materiality of evidence found to have been improperly admitted or rejected, and when satisfied that no injustice has been done, and that the verdict would have been the same with or without such evidence, they have refused a new trial. (*Doe v. Tyler*, 6 Bing. 561.) Courts of equity have, however, been governed by very different principles from those of a court of law, in granting or refusing new trials of issues of fact. Though evidence had been improperly admitted or rejected, if a court of equity was satisfied that the verdict ought not to have been different it would not grant a new trial merely on such ground. (*Barker v. Ray*, 2 Russ. 63; *Lyles v. Lyles*, 1 Hill Eq. 82.) The object of a feigned issue is to satisfy the mind of the equity judge upon matters of fact, and that object is attained when the conscience of the judge is satisfied that, at the trial, justice has been substantially done. (*Mulock v. Mulock*, 1 Edw. Ch. 14; *Apthorp v. Comstock*, 2 Paige 483; *Collins v. Hare*, 1 Dow & C. 139; *Id.* 2 Bligh (N. S.) 106; *Bootle v. Blundell*, 19 Ves. 503; *Savage v. Carroll*, 2 Ball & B. 444; *Forrest v. Forrest*, 25 N. Y. 509.)

“Were this an action at law, the rulings of this court in admitting evidence would be subject to review, but, this being a chancery cause, a different rule prevails, and the inquiry here is whether or not the competent evidence in the record taken in connection with the pleadings, sustains the decree that was entered.” (*Sawyer v. Campbell*, 130 Ill. 166, 22 N. E. 464.)

Under these authorities, we are of the opinion that the unimportant and unsubstantial character of the evidence submitted is such that the whole case should not be overturned by reason thereof. It is apparent that the principal findings of

fraud may be sustained without this evidence, and it is difficult to understand that this evidence could have any substantial bearing upon the findings. We decline to reverse the case on this alleged error.

What we have said in the last paragraph as to the practice in equity in not reversing a case for unsubstantial errors, where it is perfectly clear that the result is correct, applies to several errors which the appellants have urged, and which we do not purpose to review in this opinion.

Again, it is contended by the appellants that it must be shown that the fraud was participated in by the assignee and by the creditors. As before remarked, the participation in the fraud by the assignee was found by the jury, and while the evidence is not wholly satisfactory upon that finding, we have felt that we are not in a position to disturb it. But as to the question of participation by the assignee and the creditors, we note section 229, div. 5, Comp. Stat. Mont., which is as follows: "Sec. 229. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods in action, or of the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and any bond or other evidences of debt given, suits commenced, decrees or judgment suffered, with the like intent as against the person hindered, delayed or defrauded, shall be void."

In order to exclude from the operation of this statute a purchaser for a valuable consideration, section 232 is as follows: "Section 232. The provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor."

The statutes of the state of New York upon this subject are almost identical with ours. They are as follows: "Section 1. Every conveyance, or assignment, in writing or otherwise, of

any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent as against the persons so hindered, delayed or defrauded, shall be void." "Section 5. The provisions of this chapter shall not be construed, in any manner, to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear, that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." 4 Rev. St. N. Y. (8th Ed.) pp. 2592, 2593.

Upon this statute the court of appeals of New York used the following language: "I conclude, therefore, that the judge would have pronounced the assignment void but for the additional fact that there was no fraud intended by the assignee. Having found that fact also, he held the assignment to be valid. If the decision turned, as it must have done, upon that fact, it was erroneous in point of law. By another section of the statute it is declared that 'the provisions of this chapter shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.' 2 Rev. St. p. 137, § 5. I have no doubt that, under this statute the grantee in a conveyance which is fraudulent on the part of the immediate grantor may be protected, and that this section does not refer exclusively to derivative and subsequent conveyances of the same property. But an assignee in trust for the benefit of creditors is not 'a purchaser for a valuable consideration,' however innocent he may be of participation in the fraud intended by the assignor. The uprightness of his intentions, therefore, will not uphold the instrument, if it would otherwise for any

other reason be adjudged fraudulent and void." (*Griffin v. Marquardt*, 17 N. Y. 28.)

See, also, the following language from *Rathbun v. Platner*, 18 Barb. 272. "This charge cannot be sustained. The substance of the charge is that it matters not how fraudulent may have been this insolvent debtor's intent in making this general assignment, if his assignees are only free from all imputation of participating in his fraudulent designs, the assignment is to be upheld. The assignment is to be held good, notwithstanding this debtor may have made it with the express view to hinder, delay, and defraud his creditors, if the jury are only satisfied that the trustees whom he has appointed to carry out his fraudulent designs are free from the imputation of fraud themselves. The statute declares that every assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, etc., made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, etc., shall be void. 2 Rev. St. p. 137, § 1. The statute is that every assignment made with such intent shall be void. It was held by Chancellor Walworth, in the case of *Bank v. Atwater*, 2 Paige, 54, that a voluntary conveyance made by a debtor with the intention of defrauding his creditors is void, although the voluntary grantee was not privy to the fraud; and Assistant Vice Chancellor Sandford, in discussing Phillips' assignment (*Mead v. Phillips*), 1 Sandf. Ch. 85, which was a general assignment in trust for the benefit of creditors, says: "If Phillips made it with the intent to hinder, delay, or defraud creditors, it is void, although his assignees were perfectly honest and entirely ignorant of his designs." Interests thus obtained through the fraud of the debtor cannot be sustained upon any principle known to the law. (*Haguenin v. Baseley*, 14 Ves. 289, 290; *Hildreth v. Sands*, 2 Johns. Ch. 42, 43.) Such assignments must be made in good faith, or they cannot be upheld. (*Russell v. Woodward*, 10 Pick. 408; *Burdick v. Post*, 12 Barb. 168, 172.) Our statute of frauds pronounces void all such assignments which are made with the intent to

hinder, delay, or defraud creditors, as we have already seen. The statute regards the intent with which the act was committed. (*Van Nest v. Yoe*, 1 Sandf. Ch. 9, 10; *Burdick v. Post*, 12 Barb. 172.) It declares void all assignments which shall be made with such fraudulent intent. (*Van Nest v. Yoe*, 1 Sandf. Ch. 10.) Our books are full of cases where sales have been declared void under the statute because of the fraudulent intent of the assignors in making them. (*Id.*) There are many cases where the late chancellor and vice chancellor have set aside assignments made by insolvent debtors in trust for the benefit of creditors, when the assignees have been perfectly free from the imputation of fraud; and it has been the settled rule in all such cases, when the assignees have acted in good faith, to protect and ratify their sales and acts done in good faith. (*Barney v. Griffin*, 4 Sandf. Ch. 552). It is claimed and insisted, however, that the case stated in the charge of the judge is governed by a different principle, inasmuch as the assignees themselves are to take the entire avails of the assigned property to pay their preferred debts, and consequently there will not in fact be any trust for them to execute for the benefit of the other creditors provided for in the assignment, and that the case falls within the principle and is governed by the rule of *Waterbury v. Sturtevant*, 18 Wend. 353, where a debtor had conveyed property directly to his creditor in payment and satisfaction of a *bona fide* debt, and the court upheld the conveyance, notwithstanding it was conveyed by the debtor with intent to hinder, delay, and defraud other creditors, because they found that the creditor was not a party to the fraud, but received the conveyance in good faith, in payment of an honest debt, applying the general rule which exists between vendor and vendee, mortgagor and mortgagee, pledgor and pledgee. (*Beals v. Guernsey*, 8 Johns. 348; *Wickham v. Miller*, 12 Johns. 320; *Jackson v. Terry*, 13 Johns. 471; *Jackson v. Myers*, 18 Johns. 425; *Coote*, Mortg. 421; *Wood v. Dixie*, 7 Q. B. 892; *Pickstock v. Lyster*, 3 Maule & S. 371; *Holbird v. Anderson*, 5 Term R. 235.) That rule has never been applied to a case like the present, so

far as my acquaintance with the books has extended, and I do not think that any case can be found where this rule has been applied to a case like the one under consideration."

Again, in the later case of *Loos v. Wilkinson*, (October, 1888), we find the following language: "If the assignment itself is for any reason fraudulent and void, it may be set aside, and then all power of the assignee under it ceases. An innocent assignee may not be permitted to act under a fraudulent assignment. The provision of law (3 Rev. St., 7th Ed., p. 2329) that every conveyance or assignment made with the intent to hinder, delay, or defraud creditors is void, is still in full force and operation, notwithstanding the act of 1858 and the various acts relating to voluntary assignments for the benefit of creditors. It may be that in a particular case an honest assignee may, under the acts referred to, undo all the fraudulent acts of the assignor preceding and attending the assignment, and the preparation of the schedules under it. Yet, if the assignment was made by the assignor with the fraudulent intent condemned by the statute, the assignment may be set aside at the suit of judgment creditors, and all powers of the assignee, however honest he may be, taken away. In assailing a voluntary assignment for the benefit of creditors, it is important only to establish the fraudulent intent of the assignor (*Starin v. Kelly*, 88 N. Y. 418), and when that has been established the assignment may be set aside, and creditors may then pursue their remedies and procure satisfaction of their judgments as if the assignment had not been made." (110 N. Y. 195, 18 N. E. 99.)

See, also, *Starin v. Kelly*, 88 N. Y. 418. See, also, the following remark by the supreme court of California: "It is obvious, therefore, that the question upon which the case must turn is whether the conveyance was in fraud of the rights of the plaintiff as a creditor. This, under our statute, is a question of fact (Civil Code, § 3442); that is to say, a question of intent. And since the deed was without consideration, the intent which is material is that of the grantor. It is immaterial how innocent the grantee was. (*Lee v. Figg*, 37 Cal.

336; *Peek v. Peek*, 77 Cal. 111; 19 Pac. 227; *Swartz v. Hazlett*, 8 Cal. 128." *Judson v. Lyford*, 84 Cal. 508.) We are of the opinion that our statute, as we have recited above, and the constructions given to the same statute by courts of the state of New York, is conclusive upon this subject. A general assignment for the benefit of creditors is not a conveyance to a purchaser for a valuable consideration, and for that reason the fraud by the assignors is sufficient to avoid the assignment. See cases last cited; also, *Farrington v. Sexton*, 43 Mich. 456, 5 N. W. 654, and *Chace v. Chapin*, 130 Mass. 131.

Again, the appellants contend that the secretion of the assets by assignors is the only ground of fraud in this case, and that such secretion is not sufficient to avoid the assignment. Upon this point they cite cases holding that the application by the assignors of some of their assets to debts, which application was made before the general assignment, was not fraud sufficient to avoid the general assignment. But that is not at all this case. The assignment purports to be a general one of all the property of the assignors, and it is far from the fact that the secretion of the assets is the only evidence of fraud relied upon. In this case the secretion of the assets was not wholly for the purpose of paying debts due by the assignors, but such secretion was part of the evidence and findings showing fraudulent intent in the assignment.

The appellants also contend that there was error in admitting in evidence, upon the trial of this case, the judgment roll in the money-demand action of the bank against Greenhood, Bohm & Co. But the objection which they urged in this court was not made in the court below, by reason of which that court had no opportunity to pass upon the matters which are now urged.

Appellants also contend that the court erred in allowing certain amendments to the plaintiff's complaint. We have examined this matter, and are satisfied that there was no abuse of discretion in allowing those amendments.

The appellants have also called the attention of the court to

the case of *State ex rel. New York Sheep Co. v. Eighth Judicial District Court*, 14 Mont. 577, upon the question of the appointment of a receiver in the case at bar. That case is wholly distinguished from this one, as a reading of the decision will make apparent. That case was a simple money-demand action; with an attachment as ancillary thereto, and it was held that the statute did not provide for a receiver in such case. The case at bar is an equity action seeking the equitable relief of setting aside an assignment alleged to be fraudulent.

We have now reviewed all of the errors which were relied upon by the appellants, and which we regard as of sufficient importance to demand a treatment in this opinion. We are satisfied that there is nothing in the case which demands its reversal.

We will refrain, at the close of this long discussion, from giving a *resume* of the various findings of the jury, upon which the court determined that the assignment should be set aside. We refer to the elaborate statement of the case preceding this opinion. We are satisfied, as was the district court, that those findings are sufficient to set aside the assignment, and we are also satisfied that the judgment entered by the district court was correct. The trial in that court was a long, patient, and laborious one. As shown above, both of the learned judges of that court presided, and, as they inform us, they had an unusually intelligent jury. From a perusal of the findings of that jury, we are satisfied as to their intelligence and good judgment.

Inquiries into alleged fraud are always difficult and tedious. We cannot but conclude, upon our own laborious review of this case, that the same was fairly tried and the result fairly reached. The appellants had the benefit of an array of counsel drawn from the ranks of the ablest members of the bar of the county. They presented every merit and every technicality of their case. We cannot close this opinion without expressing our appreciation of the earnest and able labors of all the counsel engaged in this case. No diligence and no learning has been spared. Some of the questions involved were

first impressions in this jurisdiction, and we have felt the importance of arriving at a conclusion that would satisfy ourselves. It is most gratifying to have our labors lightened by the high order of learning which has been exhibited in the arguments and briefs of counsel.

We are satisfied of the result which we have reached, and therefore order that the judgment as rendered and entered be affirmed.

Affirmed.

PEMBERTON, C. J., concurs. HUNT, J., having tried the same as district judge, does not participate in the decision.

ON REHEARING.

PER CURIAM.—In this case a motion for rehearing has been filed and submitted. The appellants ask for a rehearing, in order that they may argue an objection to the judgment as entered in the lower court. The objection which they suggest to the judgment is only as to a portion of the same. This objection is now made for the first time. The record in this case was on file in this court for 17 months before the appeal was heard. The counsel filed briefs covering nearly 400 printed pages. On the argument we extended the time, and gave counsel more than twice as much time for argument as the rule prescribes. With all this time which counsel had to prepare the case, and with the extraordinarily voluminous briefs that were filed, and with the unusual time given to the arguments, counsel never suggested that there was the slightest error in the entry of the judgment below. We are not prepared to say that we would never grant a rehearing upon a point that was presented for the first time on the motion for such rehearing, but, under the extraordinary circumstances of this case, we do not feel that we are called upon to entertain the motion. The point presented now is wholly new, and we do not know that it is of great importance. There has been the amplest and the fairest opportunity for counsel to present

everything upon which they relied. The remittitur even was sent to the lower court, under rule 15 (13 Mont. 577), and was recalled to await the determination of this motion. As to such matters this court said, in *Mining Co. v. Holter*, 1 Mont. 429: "A rehearing will not be granted in an equity cause after it has been remitted to the court below to carry into effect the decree of the court above according to its mandate."

Again, the court said in *Davis v. Clark*, 2 Mont. 394: "This case is before us upon motion of appellant for a rehearing. In considering the questions which have been submitted, we must be governed by the rule established in *Mining Co. v. Holter*, 1 Mont. 432. The decisions of this court will not be reversed unless they are in conflict with a statute or controlling decision, to which the attention of the court has not been directed, or it appears that some question which is decisive of the case has been submitted by counsel, and been overruled by the court."

In the case of *Beck v. Thompson* (Nev.) 41 Pac. 1, the court said: "All the points raised in the petition, except as to the rent, are new matters, and, under the decisions of a long line of authorities, they should not be considered on petition for rehearing. 'A rehearing in the supreme court will not be granted in order to consider points not made in the argument upon which the case was originally submitted.' (*Kellogg v. Cochran*, 87 Cal. 192.) 'The supreme court will not consider a petition for rehearing that attempts to discuss the case upon grounds which were not presented in the original argument or discussed in its opinion.' (*San Francisco v. Pacific Bank*, 89 Cal. 23.) 'New questions cannot be raised for the first time on motion for rehearing.' (2 Enc. Pl. & Prac. 386, and authorities cited in note 1.) 'Counsel are presumed to have presented on their original argument all the grounds upon which they rely for the affirmance or reversal of the judgment appealed from.' (Id., and note 2.) We fully concur with the above-named authorities. A rehearing is denied."

In the note to 2 Enc. Pl. & Prac. cited by the Nevada court,

the author cites the following cases: *Robinson v. Allison*, (Ala.) 12 South. 604; *Bank v. Ashmead*, 23 Fla. 391, 2 South. 657, 665; *Jacksonville, etc., Ry. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1, 157, 9 South. 661; *Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364, 898; *Martin v. Martin*, 74 Ind. 207; *Lawrence Co. v. Hall*, 70 Ind. 477; *Yates v. Mullen*, 24 Ind. 277; *Graeter v. Williams*, 55 Ind. 461; *Rickhoff v. Machine Co.*, 68 Ind. 388; *Heavenridge v. Monday*, 34 Ind. 28; *Brooks v. Harris*, 42 Ind. 177; *Cramer v. City of Burlington*, 45 Iowa 630, *McDermott v. Railway Co.*, 85 Iowa 180, 52 N. W. 181; *Dietlin v. Eagan* (Com. Pl.) 2 Misc. Rep. 52, 21 N. Y. Supp. 6; *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676; *Hudson v. Jordan*, 110 N. C. 250, 14 S. E. 741; *Weld v. Manufacturing Co.*, 84 Wis. 537, 54 N. W. 335; *State v. Coulter*, 40 Kan. 673, 20 Pac. 525; *Weathersbee v. Farrar*, 98 N. C. 255, 3 S. E. 482; *Lovenberg v. Bank* (Tex. Supp.), 5 S. W. 816; *Schrichte v. Stite's Estate*, 127 Ind. 472, 26 N. E. 77; *Lawrence Co. v. Hall*, 70 Ind. 469; *Bitting v. Ten Eyck*, 82 Ind. 421; *Coleman v. Keels*, 31 S. C. 601, 9 S. E. 735; *Underwood v. Sample* 70 Ind. 450; *Porter v. Choen*, 60 Ind. 388; *Railroad Co. v. Huff*, 19 Ind. 315; *Kellogg v. Cochran*, 87 Cal. 192, 25 Pac. 677; *San Francisco v. Pacific Bank*, 89 Cal. 23, 26 Pac. 615; *Farrell v. Pingree*, 5 Utah 530, 17 Pac. 453; *Rogers v. Laytin*, 81 N. Y. 642; *News Co. v. Wilmarth*, 34 Kan. 254, 8 Pac. 104; *Knoth v. Barclay*, 8 Colo. 305, 6 Pac. 924; *Whitehead v. Tulane*, 11 La. Ann. 302; *Broom's Succession*, 14 La. Ann. 67.

We feel that it is the proper practice to deny this motion for rehearing. With all the diligence and labor in preparing and arguing this appeal, there is nothing whatever to indicate to us any excuse for counsel not having fully presented their points. We heard counsel at length, we studied their briefs at length, and deliberated over their case for many weeks; and, under all these circumstances, we are now of opinion that as to this case "*interest reipublicæ ut finis litium sit.*" A rehearing is denied.

Denied.

KING, APPELLANT, v. THE MILES CITY IRRIGATING
DITCH COMPANY, RESPONDENT.

16	463
225	408
16	463
38	387
50	392

[Submitted July 22, 1895. Decided July 29, 1895.]

NEGLIGENCE—Instructions.—In an action for damages for the breaking of defendant's irrigating ditch it is error to instruct the jury that "it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch," for thereby the defendant is not only held to the highest degree of care, but is made an insurer against all damages without regard to the question of negligence.

Appeal from Seventh Judicial District, Custer County.

ACTION for damages. Defendant's motion for new trial was granted by MILBURN, J. Affirmed.

Middleton & Light, for Appellant.

Strevell & Porter, for Respondent.

DE WITT, J.—This action was brought by the plaintiff to recover damages caused to his ranch by the breaking of the defendant's irrigating ditch. The cause of action, as alleged, and sought to be proved, was the negligence of defendant in the construction and operation of its ditch, by reason of which the same broke and damaged the plaintiff. On a trial to a jury a verdict was rendered for the plaintiff. This verdict was by the court set aside, on motion for a new trial. From this order the plaintiff appeals.

The motion was made upon two grounds. First, the insufficiency of the evidence to sustain the verdict; and, second, errors of law. It does not appear upon which ground, or whether upon both, the motion was granted.

The principal error of law complained of was that the court instructed the jury, among other things, as follows: "In this connection the court further instructs the jury that it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that

no damage shall result to the person whose lands are crossed by the ditch." This instruction was clearly erroneous. The court undertook to lay down the measure of reasonable and prudent conduct on the part of the defendant. The court did not instruct that the care by the defendant should be either ordinary or extraordinary, but, on the other hand, instructed the jury that the degree of care should be such that no damage should result. The defendant was thus held, not only to the highest and most extraordinary degree of care, but was held to exercise such care that the plaintiff would not suffer any damage. In other words, the instruction made the defendant absolutely an insurer against all damages. It removed the question of negligence from the jury altogether, and practically instructed them that, if the damage occurred, the defendant was liable, without regard to its negligence. This, of course, was error, which error the district court properly corrected in granting the motion for a new trial, and on this ground the order granting the new trial must be affirmed. (*Hopkins v. Butte & Montana Co.*, 13 Mont. 223.)

On the motion for a new trial, the court also had before it the question of insufficiency of the evidence to sustain the verdict. Upon a reading of the testimony in the case, we are not prepared to say that the court abused its discretion if it granted the new trial on this ground. We are not prepared to go further, however, and to say, from our point of view, that there was absolutely no showing of negligence which should have gone to the jury. There seem to be a few items of evidence tending to show negligence. Whether these were sufficient to justify the verdict is more properly a question in the sound discretion of the district court, who saw the witnesses and heard them testify. As remarked, we cannot find any abuse of discretion in granting the new trial on the ground of insufficiency of the evidence. To express any further views upon this subject we do not deem appropriate.

The order granting the motion for new trial is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

IN RE CONNOR'S ESTATE.

[Submitted July 23, 1895. Decided July 29, 1895.]

EXECUTORS—Qualifications—Appeal.—Where an application for appointment as executor was denied for reason of non-residence under section 45 of the probate practice act, and at the time of the hearing of an appeal from the judgment the Code of Civil Procedure of 1895 had taken effect, which, in section 2401 thereof, omitted the disqualification of said section 45, the case will be remanded with directions to dismiss the application without prejudice to the making of a new application under the law then in force.

Appeal from Seventh Judicial District, Yellowstone County.

APPLICATION for issuance of letters testamentary. The application was denied by MILBURN, J. Remanded.

Strevell & Porter, for Appellant.

PER CURIAM.—This is an appeal by M. C. Connors, Jr., from the judgment of the district court denying his application for the issuance of letters testamentary. His father, the testator, died a resident of the state of South Dakota. The will appointed the applicant executor.

The decision of the court was made under the authority of section 45, Prob. Prac. Act, which is as follows: "Section 45. No person is competent to serve as executor who at the time the will is admitted to probate, is; First. * * * Second. * * * Third. * * * or who is absent from or resides out of the state." The will was probated in South Dakota, and a certified copy of the proceedings of the Dakota court presented, with the application for appointment, in Custer county, Montana. The will was admitted to probate by the district court in Custer county; but the appointment of the applicant as executor was denied. This judgment was made June 4, 1895.

We incline to the opinion that the district court was correct in its judgment. But we refrain from a discussion or a deci-

sion of the question, for the reason that it appears that perhaps the applicant has been placed in a better position by virtue of the provisions of section 2401 of the Code of Civil Procedure of 1895, which took effect on July 1, 1895. That section treats the same subject as section 45 of the old probate practice act, and, in reciting the disqualifications of persons to act as executor, it wholly omits the provision excluding an applicant "who is absent from or resides out of the state." What the effect of that statute may be we do not now decide, as it has not been argued. We reserve an opinion. But we think that it is better that whatever rights appellant may have should be decided upon a consideration of said section 2401. A treatment of the question as raised by the brief would be wholly valueless as a precedent, for the reason that the question cannot arise in the future. It would be valueless in this case, for the reason that the applicant should be allowed to make his application, and contend only with the disabilities provided in the Code of 1895.

It is therefore ordered that this case be remanded to the district court, with directions to dismiss the application for appointment as executor, without prejudice to the making of a new application, dependent upon the law as existing after July 1, 1895. The costs of this appeal must be paid by the applicant.

Remanded.

BACH, CORY & COMPANY, LIMITED, RESPONDENT, v.
BOSTON AND MONTANA CONSOLIDATED COP-
PER AND SILVER MINING COMPANY,
APPELLANT.

[Submitted July 22, 1895. Decided July 29, 1895.]

CONTRACTS—Assignment—Evidence.—Where the assignee of a contract, who had agreed to perform all the terms thereof for and in the place of the assignor, brings an action for its breach and the defendant seeks to recoup for the value of certain property delivered to plaintiff's assignor and which, under the terms of the contract, it was plaintiff's duty to return, it was error to exclude an itemized list of such property offered by defendant and accompanied with proof that the goods described in the list were delivered to the plaintiff's assignor by his predecessor under a similar contract.

SAME—Liability of Assignee.—The liability of the assignee of a contract, bound under the terms of the assignment to perform all the terms of the contract for and in the place and stead of the assignor, relates back to the date of the contract and is not limited to the date of the assignment.

Appeal from Eighth Judicial District, Cascade County.

ACTION for breach of contract. Judgment was rendered for the plaintiff below by BENTON, J. Reversed.

Statement of the case by the court.

Action in contract. On January 28, 1892, McDonald & Brand, as a firm, executed a contract with defendant. By the terms of the agreement McDonald & Brand were to carry on a boarding and mess house for the defendant for the period of one year, or until January 28, 1893. The defendant furnished McDonald & Brand certain buildings, and a large amount of such personal property as would ordinarily be connected with the business of a boarding or mess house. It was agreed by McDonald & Brand, in the contract, that they would keep the buildings in repair, and replace any breakage, and repair any damage, that might occur through their neglect, or through the neglect of any of their employes, during the life of the agreement, and to replace and repair fixtures that might be broken. The defendant was to protect McDonald & Brand in

their board collections, deducting the same from the monthly pay roll of its employes. Afterwards, on February 26, 1892, McDonald & Brand assigned said contract and agreement to the plaintiff, Bach, Cory & Co. The defendant assented to the assignment by the following written contract: "The Boston & Montana Company, above named, hereby assents to the assignment of the above foregoing contract to Bach, Cory & Co., on condition that said Bach, Cory & Co. hereby agree to faithfully perform all the terms and conditions of said contract for and in the place and stead of McDonald & Brand, and on the further condition that the price of the board of the men boarding at the general boarding house and rooming at the bunk house be reduced to \$5.50 per week, and in all other respects the foregoing contract shall be and remain the same.

Witness our hands and seals the 26th day of February, A. D. 1892.

Boston & Montana Con. C. & S. Mfg. Co., Per F. Klepetko,
Supt.

Bach, Cory & Co."

Plaintiff pleads performance of the contract in place of McDonald & Brand, but alleges that defendant has not protected it in deducting board collections, as provided, and in other respects has violated the contract. Judgment is asked for \$2,936.93. Defendant, after denying that it had failed to comply with the conditions of the contract, denied the indebtedness sued for, or that plaintiff had carried out the contract. By way of separate defense, defendant alleges that McDonald & Brand had received certain personal property, dishes, etc., from defendant, under and by virtue of their contract, to enable them to run the boarding and mess house, and that it was the duty of said McDonald & Brand, under said contract, to return all said goods and chattels so used to defendant, at the end of the time mentioned in the contract; but McDonald & Brand did not return the same, or any part thereof. That Bach, Cory & Co., under and by virtue of its contract with the defendant company, became, and still is, under obligations to carry out and perform the terms and conditions of said con-

tract made by and between defendant and said McDonald & Brand, but that plaintiff has not performed said contract in the place and stead of McDonald & Brand, as agreed, and plaintiff neglects and refuses to return the goods and chattels described in schedule A, or any part thereof, as was its duty to do. That said goods are worth \$418.23, and that defendant is entitled to have said value of said goods set off against the claim and demand of plaintiff. The list appended to the answer is an itemized statement of the articles alleged to be missing. The replication denies that McDonald & Brand received the articles mentioned in the said schedule, or any of them; denies that plaintiff is indebted for such materials in any sum, or that defendant is entitled to have said account set off as a credit on plaintiff's demand, or that plaintiff is entitled to any credit whatever, except as stated in the complaint.

The case was tried to a jury, and verdict rendered for the plaintiff for \$458.30. Judgment was entered on the verdict. A motion for a new trial was made, upon the ground of errors of law in the instructions, and exclusion of certain testimony. From the order overruling the motion for new trial, and the judgment, the defendant appeals.

Cooper & Pigott, for Appellant.

Leslie & Downing, for Respondent.

PER CURIAM.—The case seems to have been tried by counsel on both sides upon the theory that for any goods not returned there was a liability under the contract. This proposition being therefore accepted as correct, it is plain that from and after the date of the execution of the contract, to wit, January 28, 1892, McDonald & Brand assumed such liability, until Bach, Cory & Co., with the consent of the defendant, agreed to faithfully perform all the terms and conditions of said contract, for and in the place and stead of said McDonald & Brand. One of these conditions and requirements was to replace all the goods delivered under the contract to McDonald & Brand, at the time of the execution of the contract, January 28, 1892.

The replication having denied that the goods claimed to have been missing ever went into the possession of McDonald & Brand, the defendant assumed to prove just what property was delivered to McDonald & Brand, under the contract. The defendant offered an itemized list of goods for the purpose of showing that the goods and chattels described therein came into the possession of McDonald & Brand, under the contract. The plaintiff objected to the introduction of this evidence, upon the ground that it was immaterial and irrelevant. Defendant further offered to show that J. H. Brand ran this same boarding house, under a contract like the one sued on, up to January 28, 1892, and that this contract and said Brand were succeeded by the contract of McDonald & Brand, under which Bach, Cory & Co. claim, and that the goods mentioned in Schedule A, attached to defendant's answer, passed from the possession of Brand to McDonald & Brand, and that Bach, Cory & Co. are liable for the return of said goods. The court sustained the objection. Clearly this was error. It was a most essential feature of the case, and the ruling prevented defendant from interposing a main defense. The offer was direct, and made to sustain issues made by the pleadings. Our view of the law applicable to the case is that when Bach, Cory & Co. accepted the assignment of the contract, and entered upon the performance of it, they not only assumed the performance of all acts to be performed by McDonald & Brand, had they remained parties to the contract, but that they expressly agreed to carry out the terms and conditions of the agreement "for and in the place and stead of McDonald & Brand." By this assumption they agreed to replace all property which had been turned over to McDonald & Brand by defendant, and for which McDonald & Brand could have been held liable at the expiration of the life of the contract.

The defendant offered evidence tending to show that Brand had run the mess before, and that he had had possession of these various goods, and had delivered them to his successor. If there were a more expeditious way of arriving at exactly what goods were delivered to McDonald & Brand, or were in

their possession at the date of their contract in January, 1892, we should say that that testimony became immaterial, but as a matter of inducement, and leading up to the material point just mentioned, it was appropriate and ought to have been admitted.

By instruction No. 5 the jury were charged as follows: "The plaintiff, being assignee of the contract of McDonald & Brand, was under the same obligation (after such assignment) that McDonald & Brand were under to carry out and fully perform the terms and conditions of said contract, and unless plaintiff shall prove, by a fair preponderance of evidence, that it has in all material things kept and performed the terms and conditions of said contract to the same extent that McDonald & Brand were required to keep and perform the same, it cannot recover." If the instruction had omitted the parenthetical modification, we think it would have been proper as a succinct statement of the law; but, by limiting the liability or obligations of Bach, Cory & Co. to the period after they agreed to fulfill the contract of McDonald & Brand, we think the court erroneously construed the legal attitude of plaintiff towards the defendant, it being our opinion that plaintiff's liability related to the date of the instrument, January, 1892. It did not extend further back, but commenced at that time.

The judgment must be reversed and the cause remanded, with instructions to the district court to grant a new trial.

Reversed.

MICHAUD, RESPONDENT, v. FREISCHEIMER, APPELLANT.

[Submitted July 22, 1893. Decided July 29, 1893.]

WARRANTY—*New trial—Sufficiency of evidence*—In an action for a breach of warranty of the quality of paint sold, the granting of a new trial after verdict for defendant was proper where it appeared that the paint, shortly after being put on certain roofs, curled up, cracked and blew off; that the roofs were dry and in proper condition to receive the paint; that it was properly put on, and that good paint when properly put on a roof in suitable condition to receive it would not curl up or blow off.

Appeal from Fourth Judicial District, Missoula County.

ACTION for damages for breach of warranty. Plaintiff's motion for a new trial was granted by WOODY, J. Affirmed.

Duis & Crouch, for Appellant.

PEMBERTON, C. J.—This is an action brought by plaintiff to recover of defendant the price paid for certain paint sold by defendant to plaintiff on a warranty that said paint was of first-class quality, and for damages occasioned by the alleged breach of said warranty. The answer admits the warranty as to quality, but denies that the paint was worthless, as alleged in the complaint. The damages are also denied. The case was tried to a jury, who returned a verdict for the defendant.

The court, on motion of the plaintiff, set aside the verdict, and granted a new trial. Defendant appeals from this order.

It appears from the evidence that plaintiff purchased of the defendant two half barrels of "slate roof" paint, containing, respectively, twenty-five and twenty-six gallons, and one whole barrel of fifty-eight gallons, at the price of seventy-five cents per gallon; that said paint was warranted to be of first-class quality. This is admitted; also, that the price was paid. The plaintiff used the paint in painting roofs. He commenced his painting by using the paint in the two half barrels first. When that was consumed, he used that in the whole barrel. All the paint was used in painting the same roofs. The roofs were

part tin and part cedar shingles. The paint contained in the two half barrels, within four or five days after being put on the roof, "curled up," "cracked" and blew off. That used out of the whole barrel on the same roofs did not do so, but remained. The paint from the two half barrels, used both on the tin and shingle roofs "curled up," "cracked" and blew off. This did not occur when the paint in the whole barrel was used. All the paint on the roofs used out of the two half barrels, up to the point where the use of the paint in the whole barrel commenced, "curled up," "cracked" and blew off, so that that part of the roofs had to be repainted. That it was worth \$25 to put the paint alleged to be worthless on the roofs; that the roofs were dry and in good condition to receive the paint; and that it was properly put on. There was evidence that all the paint was manufactured at Davenport, Iowa, by the Stearns Paint Manufacturing Company, from the same formula.

The evidence of the witnesses for defendant, who were experienced painters, is to the effect that good paint, if properly put on a roof, when in good condition to receive it, would not curl up, crack or blow off; but they said, if the roof was in good condition, and the paint properly put on, and did so curl up, crack and blow away, it would be because the paint was worthless.

There is no evidence to contradict the testimony of plaintiff and his witnesses that the roofs were dry and in good condition when the paint was put on, or that the work was properly done. Nor is there any reason given why the paint should curl up and crack on the tin roof, and blow away. It was certainly dry and in good condition to receive the paint. But the evidence shows that the paint did not stick to it any better than to the shingle roof. That the paint taken from the full barrel did not curl up, crack and blow away is evidence that it was of good quality, and properly put on. All the paint was put on by the same parties. That out of the whole barrel stuck to the roof; that from the half barrels curled up, cracked and blew off. This seems to be very strong proof to us, tend-

ing to impeach the character and quality of the paint contained in the two half barrels. Viewing the evidence in this light, the court granted plaintiff's motion for a new trial. This action of the court is assigned as error.

We are unable to discover in the action of the court complained of any abuse of that sound judicial discretion which should govern in such proceedings. The order appealed from is affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

FITZGERALD, RESPONDENT, v. HANSON, APPELLANT.

[Submitted July 22, 1895. Decided July 29, 1895.]

CONTRACTS—Usage—Evidence.—Evidence of a usage prevailing among physicians of a particular locality, that where one employs another to assist him in a case, the assistant is to look to the patient for his pay in the absence of a special agreement to the contrary, is inadmissible in an action by one physician to recover of another for such services, where it did not appear that such usage was known to the plaintiff or that it was so well established as to warrant the legal presumption that the parties contracted with reference thereto.

Appeal from Fourth Judicial District, Missoula County.

ACTION for services rendered. Judgment was rendered for the plaintiff below by WOODY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an appeal from a judgment in favor of the plaintiff, and from an order denying defendant's motion for a new trial. Both parties are physicians in the city of Missoula. The plaintiff sued the defendant for services in assisting the defendant in the practice of his profession, the services being principally the administering of an anæsthetic, and assisting in surgical operations. .

Plaintiff testified that he rendered the services in assisting

defendant to perform various surgical operations, as appeared in his complaint filed, and that he rendered the services at the instance and request of the defendant; that defendant sometimes came for him in his buggy, and sometimes called him through the telephone; and that the charges were reasonable, and that he charged the defendant at the time of the rendering of the services. This testimony was not denied by the defendant in his examination. Defendant did state that the patients requested him to call in the services of an assistant, and that he informed the plaintiff of such request by the patients, but the plaintiff denies that he knew that any such request was made.

Upon this testimony the verdict was found in favor of the plaintiff for a portion of the accounts set up in his complaint.

Duis & Crouch, for Appellant.

George W. Reeves and Smith & Word, for Respondent.

DE WITT, J.—There is no question but the evidence supports the verdict. It stands undenied that the services were rendered at the special instance and request of the defendant, and that they were worth the amount charged. The only point in the case is the exclusion by the court of certain testimony offered by the defendant.

The defendant's counsel offered to prove by defendant and one other physician that there was a custom prevailing among physicians and surgeons in Missoula and vicinity that, unless there is a special agreement to the contrary before the services are performed, for which an assistant is called, such as plaintiff, that the "assistant," so called, is to look to the patient, and not to the principal physician or surgeon for his pay. This proffered testimony was rejected by the court, and error in such action is assigned.

The contract of the parties stands practically admitted by the testimony to be that the defendant employed the plaintiff to perform the services, and the facts in evidence show a contract between plaintiff and defendant. Defendant was liable

for plaintiff's services. The offer was made to prove a custom or usage to the effect that the defendant was not liable at all, either primarily or secondarily. We are of the opinion that this testimony was properly excluded.

It is said by Dixon, C. J., in *Lamb v. Klaus*, 30 Wis. 94, quoting and approving *Foye v. Leighton*, 22 N. H. 75, that: "A usage explains and ascertains the intent of the parties. It cannot be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties; for it incorporates itself into the terms of the agreement, and becomes a part of it. It must be known and established. It must appear to be so well settled, so uniformly acted upon, and of so long a continuance, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it."

The supreme court of Maryland uses the following language upon this subject: "The authorities all hold that a usage, to be admissible, must be proved to be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed; and it must be certain and uniform. *Foley v. Mason*, 6 Md. 37; *Second National Bank of Baltimore v. Western National Bank of Baltimore*, 51 Md. 128; 34 Am. Rep. 300; *Citizens' National Bank of Baltimore v. Grafflin*, 31 Md. 507; 1 Am. Rep. 66; *Patterson v. Crowther*, 70 Md. 125." *Baltimore Base Ball & Exhibition Co. v. Pickett*, 22 L. R. A. (Md.) 692.

In the case of *Park v. Piedmont & A. L. I. Co.*, 48 Ga. 601, the offer was to prove a certain usage or custom in the life insurance business. The question propounded to witness was: "Do you know of any usage or custom in the life insurance business as to the commutation of renewals, etc.?" The proper question would have been, "What is the general or universal usage and custom in the life insurance business as to the commutation of renewals, etc.?" The usage or custom, to be binding, must be a general one, and of universal practice, as applicable to that particular business." The court also said:

“The contract of the parties in this case was that the defendants should receive for their services twenty per centum on all sums collected by them for first year’s premium insurance, and seven and one-half per centum on all sums received by them for continued renewals of policies. This contract is plain and explicit. There is no doubt or ambiguity as to the meaning of it, or as to the intention of the parties; but it is contended the evidence was admissible to annex an incident to the contract by the proof of usage or custom. But in all cases of this sort the rule for admitting the evidence of usage or custom must be taken with this qualification that the evidence be not repugnant to or inconsistent with the contract.”

We find the following in 1 Rice, Ev. p. 278: “Custom and usage are resorted to only to ascertain and explain the meaning and intention of the parties to a contract when the same could not be ascertained without extrinsic evidence, but never to contravene the express stipulations; and, if there is no uncertainty as to the terms of a contract, usage cannot be proved to contradict or qualify its provisions. (*Barnard v. Kellogg*, 10 Wall. 385; *Bradley v. Wheeler*, 44 N. Y. 495; *Wheeler v. Newbould*, 16 N. Y. 392; *Walls v. Bailey*, 49 N. Y. 464.) In matters as to which a contract is silent, custom and usage may be resorted to for the purpose of annexing incidents to it. (*Hutton v. Warren*, 1 Mees. & W. 466; *Wigglesworth v. Dallison*, 1 Doug. 201.) But the incident sought to be imported into the contract must not be inconsistent with its express terms, or any necessary implication from those terms. (Note to *Wigglesworth v. Dallison*, Smith Lead. Cas. (6th Am. Ed.) 677, and cases cited.) Usage is sometimes admissible to add to or explain, but never to vary or contradict, either expressly or by implication, the terms of a written instrument, or the fair and legal import of a contract. (*Allen v. Dykers*, 3 Hill 593; *Hinton v. Locke*, 5 Hill 437; *Magee v. Atkinson*, 2 Mees. & W. 442; *Adams v. Wordley*, 1 Mees. & W. 374, and other cases cited; 1 Smith, Lead. Cas. 680 *et seq.*)”

“Usage must be uniform. To permit usage to govern and modify the law in relation to dealings of parties, it must be

uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it. (*Citizens' Bank v. Grafflin*, 31 Md. 507; 1 Am. Rep. 66; *Rapp v. Palmer*, 3 Watts 178; *Barksdale v. Brown*, 1 Nott & McC. 517; *Harper v. Pound*, 10 Ind. 32; *Smith v. Gibbs*, 44 N. H. 335; *Shackelford v. New Orleans, etc., R. Co.*, 37 Miss. 202.) Evidence of particular usage to add to or in any manner affect the construction of a written contract is admitted only on the principle that the parties who made the contract were both cognizant of the usage, and are presumed to have made the contract in reference to it. (See *Kirchner v. Venus*, 12 Moore, P. C. 361; *Meyer v. Dresser*, 16 C. B. (N. S.) 646; *Appleman v. Fisher*, 34 Md. 540; *Southwestern F. & C. Co. v. Stanard*, 44 Mo. 71.)"

We are of the opinion that under the circumstances of this case, where the contract between the parties seems to be plain, and not subject to be misunderstood, the offer of proof of the usage was not sufficient to admit it in testimony. The usage proposed to be proved would set aside what appears to be the contract made between the parties. It does not appear by the offer of proof that the alleged usage was either known to the plaintiff, or that it was "so well settled, so uniformly acted upon, and of so long a continuance as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it and in conformity with it." (*Lamb v. Klaus*, 30 Wis. 97.) Again using the words in *Rice on Evidence*, it did not appear that this alleged usage was "uniform, certain, and sufficiently notorious to warrant the legal presumption that the parties contracted with reference to it." It appeared only that the usage prevailed. The usage, as proposed to be proven, falls far short in its nature of such a one as could be considered to be part of such a contract as the one proven and conceded to be the contract in this case. This seems to us to be the only legal conclusion of this case. We are not informed by the record what the ethics and courtesy of the medical profession are in such a matter. If plaintiff has transgressed professional amenities in enforcing

this demand as against the defendant, the amount of the judgment and his loss of his brethren's esteem may offset each other.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

WIGHT, APPELLANT, v. THE BOARD OF COUNTY
COMMISSIONERS OF MEAGHER COUNTY,
RESPONDENT.

[Submitted July 15, 1895. Decided July 29, 1895.]

COUNTY SURVEYOR—*Compensation*.—A county surveyor is not entitled to an allowance from the county for his reasonable expenses in making a survey, as for hire and board of team, since under section 900, Fifth Division of the Compiled Statutes, the compensation of the county surveyor is fixed at seven dollars per day while making a survey, no provision being made for expenses, as is the case with many other county and state officers.

Appeal from Sixth Judicial District, Meagher County.

ACTION by the county surveyor, to recover from the county his expenses while making a survey. Judgment was rendered for the defendant below by HENRY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The appellant brought this action against the board of county commissioners of Meagher county to recover for certain expenses laid out by him while making a survey, as county surveyor, upon the order of the county commissioners. The statute in force at that time was section 900, Div. 5, Gen. Laws (Compiled St. 1887), as follows: "Section 900. It shall be the duty of the county surveyor, by himself or one of his deputies, to execute any survey which may be required by any court, upon the application of any individual or corporation, and shall execute any survey required by the board of county commissioners. He shall be paid for his services seven dol-

lars per day while making the survey, the amount, in the first instance, to be paid by the person or corporation for whose benefit the survey is made, and in the other, by the county commissioners, by order on the county treasurer, against the proper fund."

The plaintiff was ordered by the county commissioners to make a survey. The commissioners allowed him, under this statute \$7 per day. He also claimed the expense for a team for five days at \$2 a day, and \$8 board of team, and \$9.70 for his own board while doing the work. These items of expense the commissioners refused to pay. Upon the trial, the court found that the charges for expenses were reasonable, but held that under the law (section 900, *supra*) there was no authority for paying these items. The plaintiff appeals from the judgment.

Thompson & Maddox, for Appellant.

Henri J. Haskell, Attorney General, and *Powell Black*, County Attorney, for Respondent.

DE WITT, J.—It is to be observed in the text writers and the decided cases that the courts have held very closely to the rule that when a certain compensation is allowed by statute there is no authority for allowing anything beyond the provisions of the statute.

It is said by the United States supreme court, in the case of *United States v. Shields*, 153 U. S. 88: "Fees allowed to public officers are matters of strict law, depending upon the very provisions of the statute. They are not open to equitable construction by the courts, nor to any discretionary action on the part of the officials."

We find the following in Mechem's Public Offices and Officers: "Section 856. No compensation can be recovered unless provided by law. Unless, therefore, compensation is by law attached to the office, none can be recovered. A person who accepts an office to which no compensation is attached is presumed to undertake to serve gratuitously, and he cannot

recover anything upon the ground of an implied contract to pay what the service is worth. The rule is otherwise where a person undertakes to render service for a municipal corporation, not as a public officer, but as its private agent. In such a case, he may recover the reasonable value."

Also the same work, see section 862, note 5, as follows: "It is a well settled rule that a person accepting a public office with a fixed salary is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services. Nor does it alter the case that by subsequent statutes or ordinances his duties are increased and not his salary. His undertaking is to perform the duties of his office, whatever they may be, from time to time during his continuance in office, for the compensation stipulated, whether these duties be diminished or increased. Whenever he considers the compensation inadequate, he is at liberty to resign. (*Evans v. City of Trenton*, 24 N. J. Law, 764, citing *Andrews v. United States*, 2 Story, 202; *People v. Supervisors of City and County of New York*, 1 Hill 362; *Bussier v. Pray*, 7 Serg. & R. 447.)"

The supreme court of Wisconsin says, through Dixon, C. J.: "Officers take their offices *cum onere*, and services required of them by law for which they are not specifically paid must be considered compensated by the fees allowed for other services. This principle is well settled, as will be seen by examination of the several authorities cited to this point by counsel for the defendant. But in this case the plaintiff was not without specific compensation in the form of fees expressly given by statute for the services rendered by him, and for the performance of which he has charged and obtained judgment against the county for several sums beyond the statutory allowances. The sums charged were for personal expenses, hotel bills, railroad fare, team hire, etc., while traveling to serve criminal process, for which the statute says ten cents per mile shall be paid. (Rev. St. c. 133, § 1, subd. 27; 2 Tayl. St. page 1514, subd. 27.) Those charges were wrong, and it

was wrong for the circuit court to allow them, and the judgment appealed from is erroneous. Where a statute gives a fee to the sheriff or other officer for the service of process, and there is nothing in the same or some other statute showing a different intention, the fee so given is the sole compensation to the officer for the performance of the service, and no other or further can be charged or obtained. This principle has been directly affirmed by the decisions of this court in *Massing v. State*, 14 Wis. 502; *Jones v. Supervisors*, Id. 519, and *Tenney v. State*, 27 Wis. 387. And in such case the board of supervisors have no authority to make extra allowances to the officer, even though they should be of opinion that he ought to have them. This has been determined in several of the adjudged cases cited by counsel for the defendant." (*Crocker v. Supervisors*, 35 Wis. 286.)

The same court, in a later case, said: "It was held in *Crocker v. Supervisors*, 35 Wis. 284, that 'officers take their offices *cum onere*, and services required of them by law, for which they are not specifically paid, must be considered compensated by the fees allowed for other services.' That rule is sustained by several other adjudications of this court, cited in the opinion in that case by Chief Justice Dixon. The rule is applicable to a case like this, where the claim is for expenses incurred by the officer in the discharge of his official duties instead of official services. Indeed, the claim in *Crocker v. Supervisors* was for expenses and disbursements by a sheriff in the execution of process. Hence, the claim of the plaintiff is not valid unless there is some statute requiring or authorizing the county board to reimburse his expenses for fuel and stationery. We are referred to no such statute. On the contrary, the statute (Rev. St. page 238, § 669, subsection 7) confers upon the county board power to provide fuel and stationery for certain county officers, necessary for the discharge of their official business. The county surveyor is not named as one of these officers. *Expressio unius est exclusio alterius*. If there is any other provision of statute which empowers the board to make such provisions for the county surveyor, there

is none which makes it the duty of the board to do so. The fact that the county furnished the plaintiff an office in the court house cannot impose upon it the obligation to provide fuel and stationery to be used in it." (*Towsley v. Ozaukee Co.*, 18 N. W. 840.)

The appellant has not cited us to authorities which take a view of this subject different from those which we have above quoted. He cites numerous authorities to the effect that the law must be construed reasonably, and the law must not be held to require impossibilities, and that the legislature must be presumed not to have intended that which is against reason. But we have no means of knowing that the legislature considered it against reason that \$7 a day would compensate a surveyor for his services and pay his expenses. The legislature said that he should receive \$7 a day for his services. They do not say that he should receive any additional amount for expenses in performing these services.

It is to be noted that there are very many provisions in the statute allowing county and state officers certain items of expense, and, as remarked in the last Wisconsin case cited, there seems to be room for the application of the rule, *Expressio unius est exclusio alterius*.

The legislature provide in detail for what they consider the proper expenses of certain officers, but in the case of a county surveyor they give him simply a per diem in gross, and, for all that is before us, it was the opinion of the legislature that the surveyor could pay his expenses and leave a reasonable margin of profit to himself for his services. It may be that this compensation of \$7 is inadequate, but we are of the opinion that it is not for us to so determine, when the legislature seems to have determined otherwise.

This decision is not important as a precedent for the future, for the reason that Political Code 1895, § 4639, provides in detail what fees and expenses shall be allowed to a county surveyor. If the old law were such that it did not provide sufficient compensation for the services and expenses, the county surveyor could appeal to the legislature, and have the matter

put upon a fair and reasonable basis. Whether that is even done by Political Code 1895, we do not know, as we are not the judges of that subject. It is an extremely dangerous precedent for a court to go outside of the statute on the question of fees and allowances of officers for the performance of their duties.

While it may be that this decision is a hardship upon the county surveyor, we believe it is upon the safe side of construction, and that the remedy, if any there should be, must be sought from the legislature. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

KELLEY, RESPONDENT, v. THE FOURTH OF JULY MINING COMPANY, APPELLANT.

[Submitted July 15, 1895. Decided July 29, 1895.]

NEGLIGENCE—Safe place to work—Mining.—It is the duty of the employer to use all reasonable means to provide a safe place in which the employe may perform his service, and therefore, a miner engaged in driving a tunnel, whose work is confined to drilling and blasting from its face, while assuming the risk naturally attendant upon such work, does not assume the risk of the failure of his employer to use reasonable precautions to prevent the roof of that part of the tunnel already created from caving upon him, or failure to keep the floor of the tunnel so free from debris as not to obstruct his escape in case of accident.

SAME—Contributory negligence—Mining.—A miner engaged in drilling and blasting in the face of a tunnel and who did not understand timbering a mine, is not guilty of contributory negligence in remaining at work in the tunnel where it appeared that the day before the caving in of a portion of the roof of the tunnel by which he was injured, he had assisted in putting in a stull under it by direction of the foreman, and that afterwards upon noticing the dirt falling from the roof, he asked the foreman, who was an experienced timberman, if it was safe and was assured that it was,—it being a disputed question as to whether the stull was properly placed in the mine, and whether, if properly put in, was sufficient to support the roof, and it not appearing that the danger of the mine caving at the time of the accident was obvious.

SAME—Contributory negligence—Promise to remove obstacle to escape.—Nor would the miner in such case be guilty of contributory negligence in remaining at work when the danger of working in the tunnel was increased by reason of an accumulation of debris behind him which would obstruct escape in case of accident, where on the afternoon before the mine caved in, he requested the foreman to have the same removed and received his promise that it would be removed the following morning, since he would be justified in continuing at work for a reasonably sufficient time for the performance of such promise, notwithstanding the increased danger,—there being no obvious or immediate danger of the mine caving at the time and the miner was

relying upon the foreman's assurance of its safety. (*McAndrews v. Montana Union Railway Co.*, 15 Mont. 290, distinguished.)

SAME—Agency—Vice-principal.—A foreman for a mining company who has full control of the property, employes, tools, materials and complete charge of the management and development of the mine, is a vice-principal of the corporation, and, when guilty of negligence in not sufficiently timbering a tunnel in which an employe was working and received his injuries, his negligence is the negligence of the corporation for which it must respond in damages.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION for damages for personal injuries. The case was tried before HUNT, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action for damages for personal injuries.

The plaintiff is a miner, and alleges substantially in his complaint that on the 27th day of May, 1891, he was actually engaged and employed by the defendant, which is a corporation, in mining in a tunnel in its mine; that he was employed in drilling, blasting, and running said tunnel in said mine; that it was the duty of said defendant to furnish and sufficiently and safely timber said tunnel, so as to properly support the roof and sides thereof; that it was the duty of the said defendant, at the same time, to keep the said tunnel free from all debris, dirt, rock, and accumulation of material or matter, so as to render egress and ingress in and out of said tunnel easy and safe, so that any one could pass without obstruction from the point where plaintiff was working in said tunnel to the mouth thereof. It is alleged that defendant negligently failed to so safely timber said tunnel, or to keep the same free from debris, rock, and dirt, and other matter, which accumulated therein, between where plaintiff was working and mining and the mouth thereof. It is alleged that defendant had negligently permitted said tunnel to become obstructed with a large amount of rock, dirt, and matter, at a point therein between where plaintiff was working and the mouth thereof, which rendered egress and escape therefrom in case of accident difficult

and dangerous; and that defendant had notice of the condition of said tunnel. It is alleged that, by reason of these wrongful and negligent acts and omissions of the defendant, the said tunnel, on the 27th day of May, 1891, caved in, and the roof thereof fell upon the plaintiff, at a point near where he was working; and that, by reason of the accumulation of said rock, dirt, and material therein, he was prevented from escaping therefrom; that he was caught and crushed, while attempting to escape from said tunnel, on the pile of rock, dirt, debris, and matter which defendant had wrongfully and negligently permitted to accumulate therein, by the dirt, rock, and material which fell upon him from the roof thereof. Plaintiff alleged that he was without fault or negligence in the premises; that he was permanently injured, and rendered helpless for life thereby; and claims damages in the sum of \$50,000.

The answer denies the allegations of the complaint as to negligence, and alleges that it was the duty of the plaintiff and his fellow servants to properly timber the tunnel, and that the tunnel caved in by reason of the negligence of the plaintiff and his fellow servants in timbering the same, and that the plaintiff knew at the time of the accident that the tunnel was obstructed by debris, rock, dirt, etc., as alleged in the complaint, as well as the condition of the timbers in said tunnel.

The replication denies the new matter pleaded in the answer, and alleges a promise on the part of the foreman of the defendant to remove the debris, rock, and dirt from the tunnel, made prior to the accident.

The evidence of the plaintiff is, substantially, that he was employed to work in the mine of the defendant in the early part of April, 1891; that he continued to work there as a miner until he was injured, on the 27th day of May; that he was employed in running the tunnel or drift on the 100-foot level; he was engaged in drilling and blasting in the face of the tunnel; he assisted in extending the tunnel more than 100 feet in length; that he threw the rock he blasted from the face of the tunnel behind him; that he never removed any of this rock from the tunnel; that he was never asked to take this rock

out of the tunnel; his work was exclusively drilling and blasting; that this rock blasted from the face of the tunnel and thrown behind him was removed by another man; that, the afternoon before the accident, he called the attention of the foreman, John Sheehan, to the accumulation of rock, dirt, and debris in the tunnel; that he told the foreman "it was getting pretty rocky to crawl over that pile of rock,—that a man had to get down on his hands and knees and scratch the dirt away first;" that he asked the foreman when he was going to remove it; that the foreman said he would remove it "the following morning, as soon as he could get the carman off the 200-foot level, where he was working;" that the foreman did not remove this debris, as promised; that, the day before the accident, he had put a stull in the tunnel; that he put the stull in under the directions of the foreman; that, after it was put in, the foreman examined it with a two-handed striking hammer; that the foreman was in the habit of coming around and examining the work every afternoon, and, if anything was wrong, "he would tell you;" that, before putting in the stull, the dirt and sand were dropping from the roof; that he called the attention of the foreman to this, and asked that it be timbered; that he asked the foreman if it was safe; that the foreman said it "was perfectly safe, and when it needed timbering he would attend to it; he was there and knew his business; he had been a timberman in the Moulton for five years;" that he took his assurance, and had no apprehension of danger whatever; that thereafter the foreman caused two half sets of timbers to be placed in the tunnel; this was done before the stull was put in; that the foreman sent a man (who was carman, and doing whatever they put him at) to put in these two half sets, and directed witness to assist; that he had done no timbering in the mine, himself, prior to this; that, when he went into the tunnel to work, on the morning of the accident, and while throwing back the dirt and rock blasted from the face the afternoon previous thereto, he heard the timbers "creaking," and noticed fine dirt falling from the roof; he made a "jump" to get out, and "landed" on this pile of dirt

behind him, and was caught by the falling dirt and timbers, and injured, as alleged in the complaint. He testifies that he was hired and paid by John Sheehan, the foreman; that Sheehan was the only person in control at the mine; that Sheehan received orders from no person at the mine; that he had full control of the mine; that none of the members of the defendant corporation were at the mine until after he was hurt; that the entire work was done as Sheehan directed; he hired and paid off all the men.

The evidence of John Sheehan, foreman of the mine contradicts that of the plaintiff in most particulars. But that he had entire control and management of the mine is not disputed. The two half sets of timbers, mentioned in plaintiff's evidence as having been put in the tunnel, did not fall at the time of the accident. The stull, for some reason, gave way, and the roof, which was supported by it, fell upon the plaintiff. There is evidence, pro and con, as to whether the stull, if properly put in, was sufficient to support the roof; whether the roof should have been supported by other timbers; and as to whether it was properly placed in the tunnel; as well as to whose duty it was to timber the mine. Any further statement of the evidence necessary to be made will be found in the opinion.

No question is raised as to the extent of the injuries sustained by plaintiff. It is not claimed that the damages awarded by the jury are excessive. The case was tried to a jury, who rendered a verdict for plaintiff in the sum of \$15,600. From the judgment, and order denying a new trial, defendant appeals.

Thomas C. Bach. for Appellant.

I. The respondent was not working in a place; he was working in the creation of a place. Where men are engaged in building a railroad, a bridge, a place—in other words where they are constructing a place, all who are engaged in that work are fellow servants, while they are so engaged; if the master has supplied competent servants, sufficient material and tools from which the servants are to select, then those who are

engaged in prosecuting the work are fellow servants, even though one of them hires and discharges the men. It is not a duty of the master to watch the work as it goes, and see that each of those, who are at work, does his work properly. (*Consolidated Coal & M. Co. v. Clay*, 38 N. E. 610-613 [Ohio]; *Armour v. Hahn*, 111 U. S. 313; *Ross v. Walker*, 139 Pa. St. 42; *Copper v. R. R. Co.*, 103 Ind. 305; *Cullen v. Norton*, 126 N. Y. 1; *McKinnon v. Norcross*, 148 Mass. 533; *Brazil & Ch. Coal Co. v. Cain*, 98 Ind. 282; *Burns v. Sennett*, 33 Pac. 916; *Lindvall v. Woods*, 41 Minn. 212; *Dewey v. R. R. Co.*, 97 Mich. 329; *Daubert v. Pickle*, 4 Mo. App. 590-591; *Bern v. Null*, 21 N. W. (Ia.) 701; *State v. Malster*, 57 Md. 287-307; *Beesley v. Wheeler & Co.*, Mich.) *

II. Where the law imposes a duty upon the master, whoever acts for the master in the discharge of that duty is the *alter ego* of the master, whose act is the act of the master, for which act, if it be negligently done, the master is responsible. The master has that legally imposed duty to perform; it must be performed, if not performed, or if negligently performed, and injury happens thereby, the master is responsible, and he cannot escape responsibility by urging that he entrusted the performance thereof to a competent and careful agent. That is the true test, and not the test of inferior and superior servant. But outside of these duties there can be no question of vice-principal. "Those duties cannot be extended or increased by the circumstance that they are performed through the agency of another person." (*Ross v. Walker*, 139 Pa. St. 42.) Therefore it will be seen that the question turns rather on the character of the act than on the relation of the employes to each other. See also *Crispin v. Babbit*, 81 N. Y. 516; *Ross v. Walker*, 139 Pa. St. 42; *Cullen v. Norton*, 126 N. Y. 1; *Hussey v. Coger*, 112 N. Y. 614; *Conley v. City of Portland*, 78 Me. 217; *Ell v. N. P. R. R. Co.*, 1 N. Dak. 336; *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, cited in *N. P. R. R. Co. v. Hambley*, 154 U. S. 358-360; *McKinnon v. Norcross*, 148 Mass. 533; *Larich v. Moies*, 28 Atl. (R. I.) 661; *Salem Stone & Lime Co. v. Chastain* 36 N. E. 910;

Neyes v. Wood, 102 Cal. 389; *Burns v. Sennett*, 33 Pac. 916; *Loughlin v. The State*, 105 N. Y. 150; *O'Connell v. R. R. Co.*, 20 M. D. 222; *Lindvall v. Woods*, 41 Minn. 213; *Matthews v. Case*, 61 Wis. 491; *Fones v. Phillips*, 39 Ark. 17; *Brazil & Ch. Coal Co. v. Cain*, 98 Ind. 282; *Railroad Co. v. Handman*, 13 Lea (Tenn.) 423; *De Mancho v. Builders Iron Foundry*, 28 Atl. 661; see also Cooley on Tort page 543; see also an article written Judge Dillon in 24 Amer. Law Review cited in *Ell v. R. R. Co.*, 1 N. D. 347, *supra*. Under these authorities then Kelly was not the *alter ego* of the defendant in regard to the place, because the rule of place was not concerned. He was the *alter ego* of the defendant in selecting materials and fellow servants; but as we have seen there was no negligence as to materials or as to the other men.

III. Granting that Sheehan was the *alter ego* of the defendant,—granting that he made the promise testified to by Kelly—granting even that the defendant itself made that promise—still instruction No. 5 does not state the law correctly. By this instruction the court charged the jury that in so far as the presence of dirt or rock on the floor of the tunnel was concerned, “The plaintiff was justified in continuing at work, notwithstanding his danger was increased by such accumulation, for such period of time after the promise as it would be reasonable to allow for its performance, and for any injury suffered within any period which would not preclude the reasonable expectation that the promise might be kept he may recover.” Surely that is not the law. The true rule (subject to modifications given below) is this: That whether or not the plaintiff is “justified” by the promise in remaining is a matter for the jury to say, and not for the court. It is for the jury to say whether or not, under all the circumstances, the defect, its character, the danger to be apprehended therefrom, and the promise, a reasonably prudent man would be “justified” in remaining. (*Hough v. R. R. Co.*, 100 U. S. 213, and cases cited; see also *District of Columbia v. McElligott*, 117 U. S. 621; *Kane v. R. R. Co.*, 128 U. S. 325; *Counsell v. Hall*, 145 Mass. 468 and case cited; *Manufacturing Co. v. Morris-*

sey, 40 Oh. St. 148; *Missouri Furnace Co. v. Abend*, 107 Ill. 45-58.) But the instruction is wholly improper. It is not every promise to repair or remove that so qualifies the defense of contributory negligence or assumption of the risk. All of the cases which hold that the promise in any way weakens the defense are based upon complicated machinery, of which the nature is better comprehended by the master than by the servant. The true rule is: Where the machinery is not complicated and where the danger is apparent, then the master's promise is no justification and the defense is absolute, notwithstanding the promise, and the instruction is wholly improper under the facts in this case. (*Meador v. Lake Shore & M. R. R. Co.*, 37 N. E. 721; *Corcoran v. Milwaukee Gas Light Co.*, 81 Wis. 193; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Gorven v. Hurley*, 56 Fed. 674-982-983; *Marsh v. Chickering*, 101 N. Y. 396.) The case of *McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, is certainly decisive of this controversy. Plaintiff knew that the dirt would materially retard his progress, and this at least he would have known had he exercised any thought at all, and he is bound to exercise such thought as men of his kind usually have, for he impliedly agreed when he took the service that he had such skill and experience in such work as usually possessed by men in that business. (*Pittsburg etc. R. Co. v. Adams*, 105 Ind. 152, and cases cited in report of this case in 5 N. E. 187-192; *Tuttle v. R. R. Co.*, 122 U. S. 189.) This is particularly true when it is remembered that it must appear that the servant must have relied upon the promise, and that it must appear that plaintiff was justified in assuming that the promise would be kept. Here the promise, if any, was to have it repaired in the morning, and there is no evidence that plaintiff remained either relying upon the promise or that the promise would be kept. See cases above cited; *Lewis v. N. Y. & N. E. R. R. Co.*, 155 Mass. 73; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148-150-154; *McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, where the chief justice says the plaintiff "never refused to use the car; he was never threatened to be discharged if he did not use it."

IV. There is a direct conflict in the instructions. Where conflicting instructions are given, there is error. (*Kelly v. Cable Co.*, 7 Mont. 70-81, for which reason that case was reversed. See end of the opinion. See also *District of Columbia v. McElligott*, 117 U. S. 621; *Solomon v. City Etc., Co.*, 12 So. 339; *Palmer v. McMaster*, 10 Mont. 390; *Harrison v. R. R. Co.*, 65 Cal. 376; *Voegli v. Pickle*, 49 Mo. App. 643.)

V. The evidence is insufficient to justify the verdict and the same is against the law. This does not involve a dispute in the testimony. There was no act of the defendant, of which the plaintiff complains, of which plaintiff did not know or of which he could not have known, the full character as well as the defendant. Whether or not the defendant ought to have had a timberman to look after the timbering and to do it, the fact remains that defendant had no such man and the plaintiff knew it. Although the law imposes certain duties upon the employer, still where the servant enters into the employment and knows (or even has ample opportunity of knowing) that the master, has, for instance, imperfect machinery, or no timberman, the servant assumes the risk of such employment. (*Tuttle v. R. R. Co.*, 122 U. S. 189; *Norfolk R. R. v. Jackson*, 8 S. E. 372; *Hayden v. Manufacturing Co.*, 29 Conn. 548; *Bailey's Master's Liability*, page 145 et seq.; and see cases cited in *Cooley on Torts*, page 551 et seq.) It is not a question of contributory negligence, it is "the assumption of the risk." There is a distinction between the "assumption of the risk" and contributory negligence. (*Tuttle v. R. R. Co.*, 122 U. S. 189; *Mundle v. Manufacturing Co.*, 30 Atl. 16.)

C. B. Nolan and T. J. Walsh, for Respondent.

Were appellant's reasoning correct, there would be no cases in the books in which recovery was had under any circumstances by a man who had suffered an injury by the negligence of any person while they were engaged in building a house, operating a mine, extracting stone from a quarry, excavating for sewers or foundations or other purposes, constructing a railroad or unloading a ship. The plaintiff would

not have prevailed in any of the following cases: *Cunningham v. U. P. Ry. Co.*, 7 Pac. 795; *Beeson v. G. M. Cy. M. Co.*, 57 Cal. 20; *Koosorowski v. Glasier*, 8 N. Y. 197; *Con. Coal Co., Wombacher*, 134 Ill. 57; *Kelley v. Wilson*, 21 Ill. App. 141; *Quincy Coal Co. v. Hood*, 77 Ill. 68; *U. P. R. R. Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. Rep. 65; *Reddon v. U. P. Ry. Co.*, 15 Pac. 262; *Anderson v. Bennett*, 16 Or. 515; *Slater v. Chapman*, 67 Mich. 523; *Pantzar v. Tilly Foster Co.*, 99 N. Y. 368; *Chicago v. Sobkowiak*, 34 Ill. App. 312; *Hall v. St. F. Water Co.*, 48 Mo. App. 356; *Ryan v. Bagaley*, 50 Mich. 179; *Doyle v. Baird*, 6 N. Y. S. 517; *Trihay v. Brooklyn L. M. Co.*, 11 Pac. 612. Nor would the court have sent back for a new trial the case of *Kelley v. Cable*, 7 Mont. 73. There must be an error somewhere, either in these cases or in the argument of counsel. The respondent submits that it may be readily found in the latter.

The rule appealed to is accurately stated in the case of *Armour v. Hahn*, 111 U. S. 313, cited by appellant. "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them or their fellows." It becomes therefore, a matter of vital importance to inquire whether Sheehan was a mere fellow servant or whether he was the representative *pro hac vice* of the defendant. The appellant's discussion of this question omits wholly the consideration of a principle of controlling importance which is clearly elucidated in the case of *State v. Matster*, 57 Md. 308, cited in its brief, and expressed by the standard text writers as follows: "One to whom his employer commits the entire charge of the business, with power to choose his own assistants, and to control and discharge them as freely and fully as the principal himself could, is not a *fellow servant* with those who are employed under him, and the master is answerable to all under-servants for the negligence of such a managing assistant, either in his

personal conduct within the scope of his employment, or in his selection of other servants." (Shearman & Redfield on Negligence, 102.) The language last above cited is quoted as the law or the principle it asserts expressly approved in the following cases: *Woods v. Lindvall*, 1 C. C. A. 37-47, S. C. 143 U. S. 202; *Brown v. Sennett*, 68 Cal. 225; *Beeson v. G. M. G. M. Co.*, 57 Cal. 31; *City v. Mulcairns*, 67 Wis. 24; *Cunningham v. U. P. Ry. Co.*, *supra*; *Brown v. Gilchrist*, 45 N. W. 83; *Slater v. Chapman*, 67 Mich. 523; *Wall v. Louisville Ry. Co.*, 28 N. E. 611; *Dayharsh v. H. & St. F. Ry. Co.*, 103 Mo. 570; *Rima v. Rossie Iron Works*, 120 N. Y. 433; *Bennett v. Anderson*, 16 Or. 515; *Cox v. Syenite Granite Co.*, 39 Ill. App. 424; *Hunn v. Michigan Central*, 78 Mich. 513; see also Wharton on Negligence, 229; Thompson on Negligence, 1028, § 34; Cooley on Torts, 665 (2nd Edition). The management of appellant's entire business was entrusted to Sheehan.

The court submitted to the jury whether he was a vice-principal. They found that he was. This was unnecessary. The law made him such. Debate on the question is foreclosed in this court by the decision in *Kelley v. Cable Co.*, 7 Mont. 73. "It is a part of the personal duty of the master to give direction to the work he undertakes, and to prescribe a system for conducting it. This may be done by rules when necessary, or by the personal guidance of managers and foremen. In doing so the master must use ordinary care for the safety of his employes." (*Schroeder v. C. & A. R. Co.*, 108 Mo. 322; *Hunn v. Michigan Central*, 78 Mich. 513; *Anderson v. Bennett*, 16 Or. 515.) From which it would follow, even on the line of argument of appellant, that Sheehan was the vice-principal with reference to the omissions charged against it.

The respondent contends that the defendant did not discharge the duty it undertook; that it should have put in a whole set or a half set instead of a stull. That it was the duty of the defendant to put in or direct the putting in of a half or a whole set, if in the conduct of good mining such protection would have been reasonable, does not admit of question. It

certainly was not incumbent on Kelley to do so when Sheehan directed a stull to be put in, in view of the rebuke he received and the promise made him when he before ventured to express his opinion of what ought to be done. His primary duty was obedience, and he was not expected nor permitted to set up his judgment or opinion against the direction of the master. (*Harrison v. D. & R. G.*, 27 Pac. 728.) Moreover, he was entitled to rely on the supposed superior knowledge of his master. (*Shortel v. City*, 24 Am. St. Rep. 317, and note.)

As to the accumulation of debris in the tunnel the question is: "Did the master do everything which in the exercise of reasonable and ordinary care and prudence, he ought to have done," or, "Did he omit any precaution which a prudent and careful man would take, or ought to have taken." (*Pantzar v. Tilly Foster Co.*, *supra*.) The plaintiff assumed those risks alone which cannot be obviated by the adoption of a reasonable measure of precaution by the master. (*Id.*) In the ordinary conduct of running a tunnel there must be at times an accumulation of debris therein. The risks attendant on such ordinary accumulation, plaintiff assumed, but he did not assume any increased risk consequent on the defendant's permitting it to accumulate in amount beyond what would be found there in the orderly conduct of the business with regard to the safety of the plaintiff and his associate. There is no possibility of confounding the law of this case with the principles announced in *McAndrews v. Montana U. R.*, 15 Mont. 290. There the danger was patent, unmistakable. Promise or no promise, he should not have attempted to run the handcar across the bridge.

Instruction No. 5 was copied from *Hough v. R. Co.*, 100 U. S. 213, and is therein declared to be the law. It comes originally from Shearman & Redfield on Negligence, 96 (3rd Ed.), and has been adopted by the courts generally as the correct expression of the rule. The very language will be found in *Rothenberger v. Milling Co.*, 59 N. W. 531, in *N. F. R. Co. v. Young*, 49 Fed. 723 (1 C. C. A. 428), and in *Stephenson v. Duncan*, 73 Wis. 407, and the text is referred to in

nearly every case dealing with the proposition. The language used by Judge Cooley is certainly as favorable to the servant. (Cooley on Torts, 559 and note.) And the rule is frequently declared in terms implying an absolute guarantee on the part of the master. (*Patterson v. R. Co.*, 76 Pa. Rt. 389; *Gulf R. Co. v. Wells*, 16 S. W. 1025; *Lyttle v. Chicago, etc.*, 47 N. W. 571; *Green v. Minn., etc.*, 31 Minn. 248.) It will be observed that the instruction does not say, as seems to be authorized by these cases, that the servant "must," but that he "may" recover. It is unquestionably true that if the danger is "so eminent that no one but a person utterly reckless of his personal safety would venture upon it, the master is not responsible," even though he promised to repair the defect.

PEMBERTON, C. J.—In this case the court instructed the jury that "it was the duty of the defendant to adopt all reasonable means and precautions to provide a safe place for the plaintiff in which to prosecute his work."

The defendant assigns this as error. Counsel for the defendant contends that, while this instruction states the law in ordinary cases, it is not applicable to this case. His contention is that the plaintiff was not working in a place, but was working in the creation of a place.

The evidence in this case is that the plaintiff was employed, at the time of the accident, in running a tunnel in defendant's mine. He was doing this work under the immediate supervision and direction of John Sheehan, the foreman and manager of the mine. Sheehan was not working in the mine with plaintiff. The plaintiff was not engaged in creating a place, on his own judgment, and at his own risk. He assumed the risks naturally attendant upon driving the tunnel. It was the duty of defendant to keep that part of the tunnel or place already created safe, by whatever reasonable means were necessary. If the plaintiff had been injured while in the actual work of drilling or blasting in the face of the tunnel he was driving, he may have had no claim on the defendant for damages; for these were risks he assumed as a miner. But he did

not assume the risk of defendant's failure to keep that part of the tunnel or place already created reasonably safe and secure. For instance: If a stone or material blasted or dug from the tunnel by plaintiff should have been blown against, or should have fallen upon, him, he would have had no remedy against defendant for any injury sustained thereby. This is a risk belonging to his employment, and which he assumed. But he did not, by his employment as a miner in driving the tunnel, assume the risk of the failure of the defendant to take such reasonable precautions as were requisite to prevent the caving and falling of the roof of that part of the tunnel already created, upon him, while engaged in his work. Nor did he assume the risk of the failure of the defendant to keep the floor of the tunnel so free from rock and debris as not to materially hinder or obstruct his escape from his place of work, in case of accident, such as occurred in this case, or might occur by premature or unexpected explosions of the dangerous materials he was using in his work. He assumed the risks incident to the work in front of him, and not the risks of defendant's failure to properly care for that part of the tunnel or place behind him, which he had completed, and turned over to the care and control of the defendant. The authorities cited by defendant's counsel, we think, are not applicable to the case at bar. The conditions and facts in the cases cited are dissimilar from those of this case. We do not think the plaintiff, at the time he was injured, was engaged in creating a place, or rendering a dangerous place safe, within the meaning of the cases cited by defendant's counsel. In *Union Pacific Ry. Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 67, the court says: "It is the duty of the employer to exercise ordinary care to provide a reasonably safe place in which his employe may perform his services." This was a case in which a miner was suing for injuries sustained in a mine by reason of a failure on the part of the employer to provide a "safe place" to work. The decision is a late one, having been rendered in October, 1892. It collates a large number of authorities, and contains an able and exhaustive discussion of the law governing this class of cases.

We think it clear, beyond question, that it was the duty of the defendant in this case to provide a reasonably safe place for the plaintiff to work in. To hold otherwise would not be in accordance with authority, sound public policy, or justice. (*Cunningham v. Union Pac. Ry. Co.* 4 Utah 206; 7 Pac. 795; *Beeson v. Green Mt. G. Mining Co.*, 57 Cal. 20; *Consolidated Coal Co. v. Wombacher*, 134 Ill. 57; *Quincy Coal Co. v. Hood*, 77 Ill. 68.) See, also, authorities cited in *Union Pacific Railway Co. v. Jarvi*, *supra*; *Mather v. Rillston*, 156 U. S. 391. The cases cited above are those in which damages were sought to be recovered for injuries sustained in mines. They might be multiplied many times. They all hold it to be the duty of the employer to provide a reasonably safe place in which the employe may perform his service, and a failure to do so actionable negligence.

Counsel for defendant contends that the evidence shows that the plaintiff so far contributed, by his own negligence, to his injuries, as to defeat his right of recovery in this case. The plaintiff testified that he assisted in putting the timbers in the mine, by direction of Sheehan; that he had not done any timbering in the mine before; that his business was blasting and drilling in the face of the tunnel; that, when he asked Sheehan if he did not think the mine needed timbering, Sheehan said he would attend to that, that he was there and knew his business, having been timberman in the Moulton for five years. Afterwards, Sheehan sent the carman, who was employed at odd jobs as well as running the car, to assist in putting in the timbers. After this, plaintiff and his partner put in the stull. This was put in under the directions of Sheehan.

On the part of defendant, there is evidence that it was part of plaintiff's duty to timber the mine. This is disputed. It nowhere appears that plaintiff, or his working partner, or the carman, understood timbering. Whether the stull was properly placed in the mine is a disputed question. Nor is it shown that the stull, if properly put in, was sufficient to support the roof; at least, it is a disputed matter. It is a mooted question whether the mine should not have been protected by full sets

of timbers, or, at least, other kind of timbers, at the place where the accident occurred. The evidence shows that the other timbers put in near the stull did not fall when it did. Nor is it improbable that the stull was displaced by the blasts of the afternoon before the accident. Plaintiff testifies that, after the stull was put in, Sheehan came into the mine and tested it with a two-handed hammer. This, Sheehan denies. Sheehan says, in his testimony, that he did not examine the timbers or stull particularly; he just glanced at them as he passed by; that he just held up his candle and looked at the stull as he went through.

From this evidence, it appears that defendant did not use proper care in procuring competent men to timber the mine; that Sheehan, defendant's manager, was guilty of negligence in not properly inspecting these timbers after they were put in the mine. In *Union Pacific Ry. Co. v. Jarvi, supra*, it is said: "Of the master is required a care and diligence in the preparation and subsequent inspection of such a place, as a room in a mine, that is not, in the first instance, demanded of the servant. The former must watch, inspect, and care for the slopes through which and in which the servants work, as a person charged with the duty of keeping them reasonably safe would do."

Witness Donan, a miner of considerable experience, says that the tunnel, according to the rules of careful mining, should have been timbered every four feet, with full sets of timbers, on account of the character of the rock and ground in the tunnel. This, of course, was not done. He says the tunnel was not sufficiently timbered to hold the roof. Sheehan, himself, testifies that the roof and sides were "drummy," by which he evidently means not solid and strong.

We think the evidence was sufficient to warrant the jury in believing that the mine was not sufficiently timbered to prevent caving, and that defendant did not use proper care in selecting competent timbermen to do the work. Plaintiff testifies that, as to the mine being safely and sufficiently timbered, he took Sheehan's assurance that it was safe, and had no ap-

prehension whatever. As to the timbering of the mine, the most that can be charged as negligence on the part of the plaintiff is that he did not properly put in the stull. But the evidence is not conclusive, by any means, that the cave occurred on account of the stull being improperly placed. It is not an illegitimate inference, from the evidence, that the cave would have occurred however well the stull might have been put in. It is a fair inference from the evidence that the stull was not sufficient to support the roof of the mine, and that the cave occurred for want of sufficient timbering. And it may not be improper, in this connection, to remark that the evidence discloses the fact that Sheehan stated that his instructions were to run the mine with as little expense as possible. Certainly, the evidence does not disclose any extravagance in placing timbers in the mine, or in securing competent men to do the work. We do not think the evidence discloses such contributory negligence on the part of plaintiff as to defeat his right to recover, as contended by defendant.

The court instructed the jury as follows: "If you find from the evidence that the danger of the place in which the plaintiff was working was increased by reason of the accumulation of rock in the drift behind him, in excess of what would ordinarily accumulate in the conduct of the business properly managed (if you find that there was such accumulation in the drift); and you further find that he called the attention of the foreman to the amassing of such rock and debris, and requested him to have the same removed, and the foreman expressly promised to do so,—the plaintiff was justified in continuing at work, notwithstanding his danger was increased by such accumulation, for such period of time after the promise as it would be reasonable to allow for its performance; and, for any injury suffered within any period which would not preclude the reasonable expectation that the promise might be kept, he may recover."

Counsel for defendant assigns the giving of this instruction as error, and claims that it is in conflict with the views of this court as expressed in *McAndrews v. Montana Union Ry. Co.*,

15 Mont. 290. The instruction under consideration is in harmony with the law as declared by the supreme court in *Hough v. Railway Co.*, 100 U. S. 213. In *McAndrews v. Montana Union Ry. Co.*, *supra*, this court said: "But this rule is a qualified one. If the machinery is not only defective, but so obviously dangerous that no ordinarily prudent man would assume the risk of using it, and the employe does use it, knowing its absolutely and obviously dangerous condition, and the dangers of using it, the master is not liable, notwithstanding the promise to remedy the defect. This qualification to the rule is well stated in *Indianapolis, Etc., Ry. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, and 15 N. E. 824, in the following language: 'Where an employe knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, even though he remained in the employer's service in reliance upon the latter's promise to remedy the defects which produced the danger.'"

The facts of the case at bar widely distinguish it from the *McAndrews* case. *McAndrews* was using a car which he knew to be absolutely and obviously dangerous. He not only used it for a long time, knowing its dangerous condition, but, at the time he was injured by the car, he was using it in a reckless manner. Under such circumstances, we held he could not rely or recover upon the promise of the foreman to get a new car.

In this case, there is no evidence or pretense that the danger of the mine caving at the time of the accident was obvious, absolute, or immediate, and that plaintiff knew of such danger, or that a reasonably intelligent and prudent man, under like circumstances, would have apprehended such danger to himself. The plaintiff testifies that the assurances of Sheehan as to the safety of the mine were such that he apprehended no danger whatever. Under such circumstances, by relying upon the express promise of Sheehan to remove the debris from the tunnel, and continuing at work for a reasonably sufficient time for the performance of such promise, he was not guilty of

such contributory negligence as to defeat his right of recovery. We do not think, therefore, that the court erred, under such circumstance, in instructing the jury that "for any injury suffered within any period which would not preclude the reasonable expectation that the promise might be kept, he [plaintiff] may recover." In view of the facts, we think the instruction properly declared the law.

In *Union Pacific Ry. Co. v. Jarvi, supra*, it is said: "The degrees of care required of the master and servant also differ, because defects in a piece of machinery or in the roof of a mine that to the eye of a competent inspector, such as the master employs, portend unnecessary and unreasonable risks and great danger, may have no such significance to a laborer or miner who has had no experience in watching or caring for machinery or roofs or slopes in a mine; and the latter is not chargeable with contributory negligence simply because he sees or knows the defects, unless a reasonably intelligent and prudent man would, under like circumstances, have known or apprehended the risks which those defects indicate. The dangers, and not the defects merely, must have been so obvious and threatening that a reasonably prudent man would have avoided them, in order to charge the servant with contributory negligence." And see authorities cited in that case.

Counsel for the defendant insists that the instruction should have been in accordance with the modified rule laid down in the McAndrews case. But, as we have seen, there was no evidence in the case calling for this modification. Nor does the record disclose that counsel sought in any way to have the instruction modified, in this respect or any other, by the court. We do not think the instruction could be held to be erroneous because it did not state all the law, or all the law under all circumstances and every state of facts, and because it was not modified so as to meet all circumstances and questions of fact, especially where the other instructions fully cover the law of the case. (*Grant v. Varney*, (Colo. Sup.) 40 Pac. 771; *Shumard v. Johnson*, (Tex. Sup.) 17 S. W. 398; Elliott's App. Proc. § 730.)

Counsel for defendant contends that by this instruction the court determined, as a matter of law, that the plaintiff was justified in continuing at work after Sheehan's promise to remove the debris, without leaving it for the jury to determine whether he was justified in so doing, under all the circumstances. The only circumstances and facts that would have rendered it contributory negligence for him to remain at work after this promise would have been the obviously absolutely dangerous condition of the tunnel. As we have said before, there was no evidence of such condition to which the court could have called the jury's attention, or submitted to the jury for consideration. We are unable on this account to discover any defect or error in the instruction. In other instructions the court plainly told the jury that plaintiff could not recover if the evidence showed him to be guilty of contributory negligence. Upon this question, the court instructed the jury as follows: "A man cannot shut his eyes to a fact, he cannot shut his eyes to a danger, and then ask for damages for an injury received from that danger." The substance of this instruction is repeated, with emphasis, in other parts of the charge to the jury. The instructions of the court, taken as a whole, fully and fairly stated the law applicable to the case, to the jury. We do not discover that they were conflicting or misleading in any respect. The instructions fully stated the law of negligence to the jury, and, we think, were remarkably fair, as a whole, to the defendant.

We do not think it necessary or profitable to consider in detail the many technical objections to the instructions raised by counsel for the defendant.

Considering the whole case, we think it clearly appears that Sheehan was the vice-principal of the defendant corporation. He employed and discharged the employees. He supplied the mine with materials and implements for its development. He had full control of the property, the employees, tools, materials, and complete charge of the management and development of the mine. No officer of the corporation, or other person or agent, had anything to do with it, or was ever present at the

mine. Under such circumstances, it cannot be disputed that he was the legal representative of the defendant corporation. We think the evidence shows he was guilty of negligence in not sufficiently timbering the tunnel where plaintiff was working and received his injuries, and in not procuring competent timbermen to do the work. He was guilty of negligence in not keeping the floor of the tunnel so free from debris as not to materially delay, hinder, or obstruct escape by the plaintiff from the place of his work, in case of accident. Sheehan being the vice-principal of the defendant, his negligence was its negligence; and it is, and should be, held liable for whatever injuries plaintiff sustained by reason thereof.

The judgment and order appealed from are affirmed.

Affirmed.

DE WITT, J., concurs. HUNT, J., having tried this case as district judge, did not participate in this decision.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, RESPONDENT, v. THE MONTANA UNION RAILWAY COMPANY ET AL., APPELLANTS.

[Submitted June 19, 1895. Decided July 29, 1895.]

EMINENT DOMAIN—Public use.—The character of a way, whether it is public or private, is determined by the extent of the right to use it and not by the extent to which that right is exercised.

SAME—Same—Railroads.—Under sections 5 and 7 of Article XV of the constitution declaring that all railroads shall be public highways, and common carriers, and prohibiting discrimination in charges or facilities for transportation of freight or passengers, a railroad, though built by a private corporation and with its main line and spurs running convenient to private mines and ore houses, is none the less a public use and may exercise the right of eminent domain.

SAME—Same—Mining.—In this state, where mining is the dominant industry, the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks and spurs to mines and mining works, as public uses, by virtue of the law of eminent domain.

SAME—Same—Public use—Necessity of use.—The right of eminent domain may be exercised by one railroad as to the right of way of another road when the latter's right of way is twenty-five feet on each side of the center of its track which runs along the side of a mountain, but which was only graded a little more than necessary for the actual space occupied by its road bed, and the adjacent portion of the right of way on

16	504
16	551
16	504
18	44
19	466
16	504
122	155
16	504
85	128
16	504
39	108
16	504
41	519

the upper hill side which was sought to be condemned, was not used, nor could be used without heavy excavation work, it being necessary by reason of the character of the mountain side and the necessity of crossing several spurs of the defendant road, that the plaintiff road be laid down to the same level as the other, it being wholly impracticable and unreasonable to go low enough to pass beneath the spurs, and to build overhead would require the plaintiff road to run into the mountain at enormous expense and switch back in order to reach the objective points of the two roads, besides materially interfering with the quartz mining operations in the vicinity, while in going upon defendant's right of way the plaintiff road would merely widen the cuts already made by the defendant road, causing no material damage, the distance between the centers of the tracks being from seventeen to twenty-two feet, and the principal object of both roads in their branches about the mountain being to haul ores from the mines. Nor would it be any objection to the condemnation of such portion of defendant's right of way, that such occupancy by the plaintiff road would render it difficult for the defendant road to construct switches or side tracks and to handle ties, it appearing that a distance of twenty-two feet between the centers of the tracks would leave room for another track, and where the elevation of the plaintiff road was so high as to prevent the defendant road from crossing at right angles a spur could be run to attain the proper elevation. Nor would the fact that the defendant road might require the condemned portion of its right of way in the future for a double track be sufficient to prevent such occupancy by the plaintiff road where the necessity was a mere future possibility and not based upon reasonably apparent traffic needs.

SAME—Same—Crossings.—The mere fact that the defendant road might be inconvenienced in the operation of their trains at the various crossings of the plaintiff road would constitute no objection to plaintiff's occupancy, since the right of one railroad to cross another is expressly given by section 5, Article XV of the constitution.

SAME—Same—"More necessary public use"—Where a railroad, which traverses the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful and safe operation of its system of tracks and spurs, and which have not been used by it during the several years of its construction in connection with any such operations, and in all reasonable probability not necessary for any such future use, and another road in seeking the same objective points is obliged to take parts of such unused right of way to avoid a considerably more circuitous route at a different grade, of very much greater cost and of serious damage to many mining properties, and would, in any event, be obliged to parallel the adversary road a part of the way, under such conditions the taking of the unused parts of the right of way of the one railroad by the other is a more necessary public use, within the meaning of section 601, First Division of the Compiled Statutes, providing that before property already appropriated to some public use may be again taken, it must appear that the public use to which it is to be applied is a more necessary public use. And under this statute it is not necessary that the new public use should, in all cases, be a different public use.

SAME—Same—Absolute necessity not a prerequisite to the exercise of eminent domain.—The word "necessary" as used in section 601, First Division of the Compiled Statutes, permitting lands appropriated for a public use to be again taken for a more necessary public use, does not mean an absolute necessity for the particular location sought, but a reasonable necessity to be determined from considerations of practicability, economy and facilities, under the particular circumstances of the case, having regard to senior rights and the benefits to the public.

SAME—Same—Crossing and longitudinal taking.—The fourth subdivision of section 600, First Division of the Compiled Statutes, provides that all rights of way shall be subject to be connected with, crossed or intersected by any other right of way and that "They shall also be subject to a limited use in common with the owner thereof when necessary." *Semble*, that the right of a railroad to condemn a portion of the right of way of another railroad, not in actual use, would not be limited to crossings or intersections only, but would extend to a longitudinal taking.

SAME—Same—Conditions imposed on crossing.—Where a spur of the defendant railroad, used for a particular mine, is on the north side of its track, while the mine is on the

south side, and the grade of the plaintiff's track is above the grade of the spur at the point of crossing and it would be more convenient for the defendant railroad to have the spur on the south side of their main track, the court will order the plaintiff road, at its own expense to rebuild the spur already constructed, upon the south side of the defendant's main track and provide suitable approaches to it for teams.

SAME—Crossings—Difference of grades.—Where there was a slight difference of elevation of grades of the two roads at the crossing of a spur of the defendant road and the only practicable way of crossing was to raise the grade of the spur from the switch to the point of intersection, the court will order the crossing to be so made at the expense of the plaintiff road.

SAME—Same.—Where, in order for the plaintiff road to cross a spur of the defendant road without raising the grade of the latter's track, it was necessary to construct a reverse grade which made a "hump" in the road and which was objected to as dangerous in that it might cause the plaintiff's trains to break in two which would obstruct the defendant's tracks with wreckage, the court will not disturb the crossing as so constructed, it appearing that its dangerous tendencies were only indirectly to the defendant road and the evidence of skilled engineers as to the feasibility of the crossing was conflicting.

SAME—Same—Damages for crossing—Commissioners.—In condemnation proceedings by a railroad company to obtain parts of the right of way of another road the question of damages for crossings may be properly referred to commissioners, under section 607, First Division of the Compiled Statutes.

SAME—Same—Watchmen at crossings.—When the employment of a watchman is made necessary by one railroad crossing another, the road invoking the right to make the crossing should be allowed to select the watchman but should be required to bear his expense.

Appeal from Second Judicial District, Silver Bow County.

ACTION by a railroad company to condemn portions of the right of way of another railroad. Judgment was rendered for the plaintiff below by McHATTON, J. Modified and affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff is a railroad corporation, duly incorporated under the laws of Montana. The defendant the Montana Union Railway Company is also incorporated under the laws of Montana. The other defendants are organized under the laws of other states.

The plaintiff alleges that it is authorized by its charter to construct, maintain and operate a line of railway from the city of Butte, Silver Bow county, Montana, beginning at a point near the terminus or depot of the Montana Central or Great Northern Railway, at or near the city of Butte aforesaid, and running and extending thence in a general westerly direction by way of the towns of Rocker and Silver Bow, in said county of Silver Bow, and through Silver Bow canyon, to a point

near Gregson's Springs, and thence in a general northwesterly direction, skirting the westerly foothills of Deer Lodge valley, to the city of Anaconda, with such connections, branches and spurs to mines and smelting works and other industries in said counties as may be deemed necessary or proper. That plaintiff is engaged in the construction of said main line of railway between the said cities of Butte and Anaconda, and also the branch and connection intended to connect on the east with the Mountain View spur and Montana Central Railway, and by means of that railway with the main line of plaintiff, at or near the Great Northern depot aforesaid, and also to connect directly with the main line of plaintiff at a point west of Butte city, to wit, at or near Rocker, and to extend to the various mines, mills and other industries situated along said branch,—all of said branch and the points above mentioned being in Silver Bow county, Montana. That the public interest requires the construction of said railway, and the branch thereof above described, and that the lands proposed by plaintiff to be taken and condemned for the use of said railway are required and necessary for the construction and operation thereof, and for a right of way, tracks, side tracks and general railway uses of plaintiff. That it is necessary to the construction and operation of said railway that the plaintiff should take, use and enjoy, for the purpose of a right of way for its branch railway above described, certain portions of land in Silver Bow county, and all being within the limits of the right of way claimed by the defendants herein for a railroad now being operated by the defendant the Montana Union Railway Company. Then follows in the complaint an accurate description of the lands which the plaintiff wishes to use for right of way purposes. The description embraces a strip of land across the Nipper claim, and within the defendants' right of way; also a strip of land in the Last Chance addition to the city of Butte, and a portion of certain blocks of the Belle of Butte addition to the city of Butte; also a strip of land across the Clear Grit mining claim; also a strip of land across the Banker mining claim; also a strip of land across the Autocrat claim; also a strip of land

across the Oro Butte claim; also strips across the Pacific claim, the Poulin claim, the Humboldt claim, the Buffalo claim, the Little Mina claim, the Blackfoot claim, the Alexander claim, the Gambler claim, the Wake Up Jim claim and the Emma Abbott claim. Plaintiff alleges that the defendants claim or own an interest or right to the property above described, and more particularly set forth by metes and bounds in plaintiff's complaint, and that the Montana Union Railway Company has no interest in said premises, except an easement for a right of way for railway purposes, and that although the property is within the limits of the right of way claimed by the Montana Union Railway Company, it has never been used by defendants or any of them for any purpose, and is not necessary for their use for railway purposes, or for any public use, and that the use for which plaintiff seeks to condemn said property, and to which said property is to be applied by plaintiff, is a more necessary public use than any use to which defendants could put said lands or any part thereof.

The plaintiff further alleges that, in the construction of its said branch line, it is necessary that said branch line should cross and intersect the Montana Union Railway and certain spurs thereof. There are about twelve of these crossings,—one at the Modock mine; one over the spur leading to the Anaconda ore house, marked B on the map; another crossing over the spur leading to the Anaconda ore house, marked C on the map; a crossing over the spur leading to the Gagnon mining claim, marked D; also a crossing over the Haggin spur, marked E; also a crossing over the Buffalo spur, marked F; also a crossing over the spur leading to the Mountain Consolidated mine, marked G; also a crossing over the spur leading to the Green Mountain and Wake Up Jim ore houses, marked H; also a crossing over the spur leading to the ore house of the High Ore mine, marked I; also a crossing over the Haggin spur, leading to the High Ore Mine ore house, marked J; also a crossing over the spur leading from the Haggin spur to the boiler house of the Anaconda mine, marked K; also a crossing over the Haggin spur, near the timber shop at the Anaconda mine, marked L.

It is alleged by plaintiff that these various crossings and intersections proposed, are to be made in the manner most compatible with the greatest public benefit and the least private injury to the defendants, and that, as proposed, the crossings will not in any way interfere with the use, operation, or enjoyment by the defendants of their said railway lines or the spurs thereof.

Plaintiff further alleges that it has been unable to agree with the defendants as to the amount of compensation to be paid for the taking of the above-described premises and the construction of the crossings, and that the interest in the premises sought to be condemned for plaintiff's use is only an easement for a right of way for the construction, maintenance, and operation of its railway.

The plaintiff's prayer is for a judgment that the use for which plaintiff seeks to appropriate the premises is a public use; that the public interests require the construction of plaintiff's railway, and that the lands and the crossings proposed to be made are necessary for the purpose of said railway and said branch railway, and that the plaintiff has a right to appropriate the premises and make the crossings; that the court ascertain the interest of said defendants in the premises described and sought to be condemned, and that an order be made appointing three competent and disinterested persons as commissioners to assess the damages by reason of the appropriation of the said property, and that on the coming in of the report of the commissioners, the court make such order in regard to the possession of said property sought to be condemned as may be proper; and that, as to the crossings, the court adjudge, regulate and determine the place and manner of making the same.

The material points of defendants' answer are a denial that the public necessity requires the construction of plaintiff's railway and the branch thereof, as set forth, or that the lands therein proposed to be taken and condemned are required or necessary for the construction or operation of plaintiff's railway, or for any use connected therewith. Defendants deny that it is necessary to the construction or operation of plaintiff's

iff's railway that it should take for right of way purposes any portions of the lands within the limits of the right of way claimed by the defendants, and as set forth in plaintiff's complaint; deny that the property, or any part thereof sought to be condemned, has never been used or that the same is not necessary for railway uses for defendants; deny that the use for which plaintiff seeks to condemn the property is a more necessary public use than any use to which defendants could put the lands or any part thereof. They deny the necessity of the crossings or intersections pleaded by the plaintiff and deny that such crossings are located in a manner most compatible with the greatest public benefit or least private injury to the defendants; deny that the proposed crossings will not interfere with the enjoyment of defendants' railway privileges.

The defendants then allege that the Oregon Short Line & Utah Northern Railway Company is the owner of these various pieces of ground described in the complaint as parts of the various mining claims heretofore referred to, and aver that all of said ground was obtained by grant, or by the exercise of the right of eminent domain, for the purpose of the construction of a railroad over the same, and for the operation of the Montana Union Railway, and that all of said ground became and was, and now is, absolutely necessary to the said defendants for the operation of said railway, and has always been used for such purposes by defendants, and defendants expect to continue to use the same, and that the same is absolutely necessary to defendants for railroad purposes.

Defendants further allege that plaintiff could easily, and at a slight increase of expense, construct its railway in a manner to avoid any conflict with or appropriation of any of the parts of the right of way of these defendants, but that the plaintiff seeks to appropriate a part of the right of way of defendants in order to save cost of acquiring right of way for itself, and not because said right of way is indispensable to the use of said plaintiff.

Defendants further aver that if plaintiff's railroad is constructed in accordance with the plan as laid out by plaintiff,

great and irreparable damage will be done them, and that, aside from the fact of dispossessing the defendants from their right of way, plaintiff seeks to cross the railway and spurs of defendants at points that will interfere greatly with the operation of the road of defendants, and that defendants' road cannot be economically, profitably, or properly operated, if plaintiff is allowed to construct crossings across its lines or spurs, as proposed by the plaintiff. Defendants further allege that by slight increase of cost, plaintiff could avoid all the crossings, and that it is not necessary that the crossing be laid as plaintiff contemplates. It is further alleged that plaintiff has no right to enter upon the right of way or roadbed of defendants, except for necessary crossings or connections, and therefore has no right of condemnation over the right of way of these defendants.

The replication of plaintiff denies that all or any of the ground became or was or is at all necessary to defendants for railway purposes, or that it has ever been used by them for such purposes, or that the defendants expect to use the same; denies that plaintiff, at slight increase, could so construct its railway as to avoid any conflict with or appropriation of any parts of defendants' right of way, or that plaintiff seeks to appropriate the right of way in question to save cost to itself, or not because the said right of way is indispensable to the use of plaintiff; denies irreparable damage, or any damage; denies that the crossings will materially interfere with the defendants' operation of their railway, or that plaintiff could easily, or at all, avoid such crossings by slight increase of cost of construction; and denies that it is unnecessary that such crossing should be made as proposed by plaintiff; and, finally, denies that plaintiff has no right to enter upon the right of way or roadbed of these defendants, except for necessary crossings or connections, or that plaintiff has no right of condemnation over the right of way of these defendants, or any of them.

The cause was tried before the court, without a jury, in September, 1893.

The testimony taken before the court is quite voluminous,

and so much of it as is deemed pertinent and necessary to explain the decision of the court is embraced within the opinion following this statement.

The judgment and order of the court, after its more formal recitals, sets forth that the judge of the district court, with a civil engineer chosen by each party, inspected the premises before the submission of the case, and thereafter it was decided "that the use for which the property described in the complaint, and hereinafter described, is sought to be appropriated by the plaintiff, is a public use, within the meaning of the laws of the United States and of the state of Montana; that the entire quantity sought to be appropriated ought so to be taken; that the appropriation thereof will not be detrimental to the public interest or welfare, and is required and necessary for the proper prosecution of the enterprise for which it is sought to be appropriated, and that the public interest requires the prosecution of the plaintiff's said enterprise; that the premises so sought to be appropriated by the plaintiff are not necessary for the use of the defendants' railway, nor for any public use, and is not now in actual use by them, or any of them; that the use for which plaintiff seeks to condemn the same, and to which said property is to be applied by plaintiff, is a more necessary public use than any use to which the defendants have or could put said lands, or any part thereof. And, no sufficient cause having been shown why commissioners should not be appointed herein, it is hereby ordered that Clinton C. Clark, Justin Butler, and C. J. Stevenson, three competent and disinterested persons, residents of the said county of Silver Bow, be, and they are hereby appointed commissioners to ascertain and determine the amount to be paid by the plaintiff to the defendants as compensation for their damages by reason of the appropriation of said property. The right sought to be obtained in this proceeding is an easement for railroad purposes, in and over the following described tracts and parcels of land situate in the county of Silver Bow, state of Montana." The order particularly sets forth the ground embraced within the limits of the right of way of defendants,

as described in plaintiff's complaint, and sought to be appropriated by the plaintiff. It was further ordered and adjudged that the crossings and intersections described by plaintiff were necessary and proper.

After expressly granting the right to cross over the defendants' spur known as the "Gagnon Spur," on the Clear Grit claim, the court made the following proviso: "Provided, however, the defendants may, and if they do, within 10 days after the date hereof, give notice in writing to the plaintiff, that they consent to the plaintiff's taking up their entire Gagnon spur, aforesaid, and placing and rebuilding the same on the south side of the defendants' main track, opposite or about opposite its present position, then, in that case, the plaintiff shall, at its own expense, and, within a reasonable time after the giving of said notice, remove and place and rebuild the said spur on the south side of the defendants' main track, opposite or nearly opposite its present position, and make the same convenient to approach by and for teams and wagons, and provide proper approaches thereto; and provided, further, that, if such consent be not given within the time and in the manner aforesaid, then the plaintiff may and shall extend its road across such spur at the present grade of the plaintiff's road, and the plaintiff shall not be obliged to put in any crossing, and in such case the defendants, if they desire to operate said spur or use the same, shall make the same conform to the grade of plaintiff's road and track, and put in a crossing at the grade of plaintiff's track, and maintain the same, all at their own expense."

It was also ordered that the plaintiff might cross the defendants' spur known as the "Buffalo Spur" at an angle of 16 degrees, 48 minutes. In relation to this spur the court added as follows: "Provided, however, that the defendants may, and if they do within 10 days from the date of this order, notify the plaintiff in writing that they consent to permit the plaintiff to raise the entire grade of the said Buffalo spur so that the plaintiff can cross the same at its own grade, then, in that event, the plaintiff shall, before making said crossing, raise the grade of the whole of said spur, at its own expense,

so as to make a feasible crossing with its road, and leave said spur in a reasonable condition for the use of the defendants; and provided, further, that, if the defendants do not give such consent within the said time and in the said manner, the plaintiff shall make said crossing at its own grade, in as reasonably safe manner as the same can be done without raising the grade of the entire Buffalo spur aforesaid."

It was also ordered by the court, in relation to the watching of the crossings, as follows: "That, except as otherwise hereinbefore provided, all said crossings shall be put in by the plaintiff at its own cost and expense, and shall thereafter and forever be kept up, watched, and maintained at the joint expense of the plaintiff and the defendants; that is to say, one-half to be paid by the plaintiff, and one-half to be paid by the defendants, or the successors in interest of said parties or either of them,—that is to say, that each road shall assume and be liable to an equal obligation in these respects. That any improvements or repairs necessary to said crossings, or expense necessary on account of maintaining the same, may be made or incurred by one road at the equal expense of itself and the other, if, after reasonable notice to such other, the latter refuses to join in the same. That defendants shall not interfere with the plaintiff while putting in said crossings, nor in any manner hinder or delay the same. That at the same time the plaintiff shall put the said crossings in place in a manner which shall cause no unreasonable inconvenience or delay to defendants' business. And it is further ordered and adjudged that the defendants shall be entitled to compensation from plaintiff for the privilege of making said crossings, but that defendants shall not be entitled, on account thereof, to any compensation or damages for the interruption or inconvenience occasioned to their business thereby. * * * That the standard of compensation shall be the reasonable value of the common use by plaintiff with defendants of the portions of defendants' right of way occupied by said crossings. That the commissioners above named and hereinbefore appointed are hereby directed and authorized to determine and assess the value of said com-

mon use, subject to the restrictions above stated, and that, in making such assessment and determination of the amount to be paid by the plaintiff to the defendants on account of said crossings and common use, the said commissioners shall determine the amount to be paid for the common use of each crossing, separately, and shall in their report mention the same distinctly and separately.

"It is further ordered that the crossings, after being made, shall remain in the common use of both roads, and that both parties shall be required to observe all the laws of the state of Montana relating to the blowing of whistles, ringing of bells, and stopping at crossings. That neither party shall stop its engines, cars, or trains on any of the crossings, or so near thereto as to interfere in any manner with the operation of the other road. That neither party shall have a preference or right of way over the crossings, but that the party whose train first comes to the stop necessary to be made before crossing shall have the right of way of that crossing at that time. That in case trains on the different roads make such stops at the same time, or at or near the same time, or within 20 seconds of each other, the defendants' train shall have the right to make that crossing first. That no engine or train, in switching, shall be entitled to pass over a crossing more than once, if an engine or train on the other road be in waiting to cross, and the switching engine or train shall allow the waiting train or engine to cross before itself crossing again. That all needful signs and signals at and for crossings shall be constructed, erected, maintained, and operated jointly by the plaintiff and defendants, and at their joint cost and expense; provided, however, that in case it be necessary to employ any person or persons expressly for the operation of such signals, or any of them, plaintiff shall have the right to select, hire, and discharge such person or persons."

The defendants moved for a new trial, which was denied, and this appeal is prosecuted both from the judgment and the order overruling the motion for a new trial.

The following is a copy of the plat introduced on the trial: (See next page.)

Shropshire & Burleigh and Forbis & Forbis, for Appellants.

If the use to which the plaintiff proposes to put its road is not a public one, then it has no right to exercise any right of eminent domain, and consequently cannot appropriate any of the ground of these defendants, either for right of way or for crossings. We hardly deem it necessary to assert that the provisions of our constitution relative to the exercise of the right of eminent domain and the crossing of one road by another refer only to roads constructed for public uses. From the fact that the plaintiff's tracks on the hill parallel those of the defendants, and that the branches, side tracks and spurs extending therefrom, reach the same ore houses and mines of private individuals and mining companies, served already by the defendants, is a fact tending to show that the construction of the plaintiff's tracks as proposed, is not a public necessity nor use, much less a "more public use" than the defendants' tracks. In some of the states laws permitting the construction of roads for the service of private interests, have been enacted and have been in some instances sustained by the courts. As we have no such laws upon our statute books, it becomes unnecessary to discuss what effect such a law would have. With the exception of the decisions founded upon these statutes, there is so far as we know but one opinion of the courts, and that to the effect that railroads cannot condemn any kind of property for the purpose of constructing a road for private uses. (*Pittsburg, W. & K. Co. v. Benwood Iron Works*, 2 L. R. A. 680, 31 W. Va. 710; *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. Rep. 615; *Denver R. L. & C. Co. v. Union Pac. Co.*, 34 Fed. Rep. 386, discussing constitution similar to ours as to public character of road; *C. & E. I. R. R. Co. v. Wiltsie*, 116 Ill. 449; Woods on Railway Law, Vol 1, 653, note; 3 Am. and Eng. R. R. Cases, 507; Lewis on Eminent Domain, 171; *In Re Rochester & G. N. R. Co.*, 12 N. Y. S. 566; *In Re Freibel*. 58 Hun. 601, 59 Hun. 617; *In Re Split Rock Cable Co.*, 12 N. Y. S. 116, 58 Hun. 351; S. C. 128, N. Y. 408, 28 N. E. 506; *St. L. I. & M. S. R. Co. v.*

Petty, 20 L. R. A. 434, (57 Ark.); *Kyle v. Texas & N. O. R. Co.*, 4 L. R. A. 275, (Texas App.); *Sholl v. German C. Co.*, 118 Ill. 427; *In Re Niagara Falls & W. R. Co.*, 108 N. Y. 375.)

The plaintiff has no right to infringe upon the defendants' right of way, either as a determined trespasser or under the guise of law. Admitting the uses of both parties to be public, the law has given no privilege to the plaintiff to appropriate the lands of the defendant already appropriated for public uses. (Lewis on Eminent Domain, 276; *Barre R. Co. v. Montpelier & W. R. R. Co.*, 4 L. R. A. 785; *I. C. R. R. Co. v. C. B. & N. R. R. Co.*, 122 Ill. 473; *L. S. & M. S. R. Co. v. M. C. & St. L. R. Co.*, 8 Fed. 858; *Contra Costa R. Co. v. Moss*, 23 Cal. 324; *Boston & M. R. R. Co. v. Lowell & L. R. R. Co.*, 124 Mass. 368; *Pittsburg J. R. Cos. Appeal*, 122 Pa. St. 533; *Sharon R. Cos. Appeal*, 122 Pa. St. 511; 3 Am. and Eng. R. R. Cases, 507 note; *Groff's Appeal*, 128 Pa. St. 634; Weed's Railway Law, Vol. 1, 672-681-688-689-691 and 692; *Mobile and G. R. Co. v. Alabama M. R. Co.*, 39 Am. and Eng. R. R. Cases 6; *In Re Providence & W. R. Co.*, 21 Atl. 965, (R. I.); *Fidelity T. & S. V. Co. v. Mobile St. R. Co.*, 53 Fed. 687.)

M. Kirkpatrick, *W. W. Dixon* and *William Scallon*, for Respondent.

Under the provisions of sections 5 and 7 of Article XV, of the constitution and the railroad incorporation act, section 680, Fifth Division of the Compiled Statutes, the plaintiff's railroad is a public highway; the public has a right to use it; it is throughout subject to legislative regulation and control, and therefore, its use is a public use, and this extends to all its branches, spurs and side tracks, whether they connect with a private industry or not. The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only by permission. The constitution is satisfied if the use is public, and the public may have the privilege of using the same. There is a great weight of authority in favor

of this proposition. (*Railroad Co. v. Railroad Co.* 32 N. J. Eq. 765; *Buffalo R. Co. v. Brainerd*, 9 N. Y. 100; *Beekman v. Saratoga R. Co.*, 3 Paige, 45; *Tracy v. Elizabethtown R. Co.*, 80 Ky. 259; *Moody v. Jacksonville R. Co.*, 2 Fla. 597; *Shaner v. Starrett*, 4 Ohio 494; *Re Killbrick Private Road*, 77 Pa. 39; *Sadler v. Langham*, 34 Ala. 311; *Warren v. Bunnell*, 11 Vt. 600; *Colorado Eastern R. Co. v. Union P. Co.* (C. C. District of Colorado), 44 Am. & E. R., Cas. 10, and note, page 24; *Chicago B. & N. R. Co. v. Porter*, 43 Minn. 527, S. C. 43 Am. & E. R., Cas. 170-172; *Kettle River R. Co. v. Eastern R. Co.* (Minn.), 40 Am. & E. R. Cas. 449, 41 Minn. 461; *Contra Costa R. Co. v. Moss*, 23 Cal. 323; *DeCamp v. Hilberma R. Co.*, 47 N. J. L. 43; *Phillips v. Watson*, 63 Ia. 28, 33; *In Palairets Appeal*, 67 Pa. St. 479, 5 Am. R. 450; *Philadelphia R. Co. v. Williams*, 54 Pa. St. 103; *Hays v. Risher*, 32 Pa. St. 169; *Lewis on Eminent Domain*, §§ 171, 164, 167; and see 20 L. R. A., page 434, note, where the cases are collected; 22 Am. Dec., pages 686-707, note; *Dock Co. v. Garrity*, 115 Ill. 155; *Mills v. Parlin*, 106 Ill. 60; *Truesdale v. Grape Sugar Co.*, 101 Ill. 561; *St. Louis & R. Co. v. Petty*, 57 Ark. 359; S. C., 57 Am. & E. R. Cas., 562-564; *Sherman v. Buick*, 32 Cal. 242.)

Again, in Montana, mining is the dominant industry; throughout a large portion of the state, and in the county of Silver Bow especially, it is the all important pursuit upon which all other industries are dependent. In the mining, smelting and reduction of ores the great mass of the population finds employment and support. The prosperity of the state is very largely due to the development of the mines. Under such conditions the business of mining is itself a public use; and this is recognized in the legislation of Montana, for, by the statute of January 4, 1872, which is a law of the state, the power of eminent domain may be exercised in aid of the development and working of mines. (Com. Stats., page 1058, §§ 1495-1507; C. C. P., § 598.) And the same has been ruled by the supreme court of Nevada, in a well considered case, under a constitutional provision the same as ours.

(*Dayton Manufacturing Co. v. Searwell*, 11 Nev. 394.) The court upheld the statute of Nevada authorizing the condemnation of property in aid of mining, remarking: "That the reasons for sustaining the act under consideration are certainly as strong as any that have been given in support of the mill dam or flowage acts, as well as some of the other objects heretofore mentioned." See also *Dietrich v. Murdock*, 42 Mo. 279; *Phillips v. Watson*, 63 Ia. 28; *Oreman S. M. Co. v. Corcoran*, 15 Nev. 147; *Hand Gold Manufacturing Co. v. Parker*, 59 Ga. 419-423; *Coal Company v. Coal Company*, 37 Md. 562; *Getz Appeal*, 65 Pa. St. 1, 3 Am. E. R. Cas. 186; *Talbott v. Hudson*, 16 Gray 423; *Olmstead v. Camp*, 33 Conn. 546; *Ladd v. Austin*, 34 Conn. 79; *Great Falls Manufacturing Co. v. Fernald*, 47 N. H. 456; *Tide Water Co. v. Coster*, 18 N. J. 521; Cooley on Const. Lim., page 659; 12 Encyc. of Law, 940-2, 945; 1 Woods on Ry. Law, pages 654-653; *St. Louis & R. Co. v. Petty*, 57 Ark. 357, 57 Am. & E. R. Cas. 562; *Farnsworth v. Lime Rock R. Co.*, (Maine, 1891), 47 Am. & E. R. Cas. 64, 83 Maine 440. Therefore, we submit, that a railroad whose tracks run to the shafts and ore houses of great mining properties, such as are mentioned in the complaint, cannot be said to connect with mere private industries. Mining in Montana is a public use, and there is nothing in the constitution or statutes of the state which prohibits the plaintiff from condemning a right of way to such industries.

The court found: "That the premises so sought to be appropriated by the plaintiff is not necessary for the use of defendants' railway, nor for any public use, and is not now in actual use by them or any of them." This finding, we claim, is fully supported by the evidence, and it is unnecessary to repeat that it will not be disturbed by this court, if there is any substantial evidence to justify it. Taking it, therefore, as established that the land in question was not actually in use, and has never been used by defendants for railway purposes, and there being no probability that it would be required for such purposes by them, it follows that the premises sought to

be appropriated by the plaintiff are not and were not necessary to defendants for railway uses. And thereupon the question arises, can such unused portions of defendants' right of way be legally appropriated by the plaintiff under the power of eminent domain for railroad purposes, the same being necessary to plaintiff for such purposes. The affirmative of this question is, we think, well supported by the authorities. In Montana the property rights of corporations are not more sacred or exclusive than those of private individuals. (§ 9, Article XV of the constitution.) The general rule on this subject is clearly stated by Mr. Wood as follows: "One public corporation cannot take the lands or franchises of another public corporation in actual use by it, unless expressly authorized to do so by the legislature, but the lands of such a corporation not in actual use may be taken by another corporation authorized to take lands for its use *in invitum* whenever the lands of an individual may be so taken, subject to the qualification that there is a necessity therefor." (1 Wood on Railway Law, page 684; 2 Wood (Miner's Ed.) page 856; *Baltimore & R. Co. v. P. W. A. R. Co.*, 17 W. Va. 812; 4 L. R. A. 790, note; *Colorado Eastern R. R. Co. v. Union Pacific R. R. Co.*, 44 Am. and Eng. R. R. Cases, 10, 18.) Lands not actually employed by a railroad company in its business, but merely held as a speculation or to supply possible future wants, are liable to be taken like the property of private individuals. (*N. Car & R. Ry. v. C. C. R. Co.*, 83 N. C. 489; 14 Am. & E. R. Cas., page 41, note; *Peoria, Etc., R. Co. v. Peoria, Etc., R. Co.*, 66 Ill. 174.)

Lands of one railroad company, not in use, or not necessary for the exercise of its franchise or the discharge of its duties to the public, may be taken by another company under a general power. (9 Am. St. R., 144, note; *In Re N. Y. C., Etc., R. Co. v. M. G. L. Co.*, 63 N. Y. 326.)

Land appropriated by one railroad company under the power of eminent domain, but not required for the exercise of its franchise or the discharge of its duties, is liable to be taken for the corporate use of another railroad company. (Cooley

on Const. Lim., page 652, note; and see *Cincinnati R. Co. v. Belle Center* (Ohio, 1891), 47 Am. & E. R. Cas. 72, 85, 48 Ohio St. 273; *Mobile, Etc., R. Co. v. Alabama M. Co.* (Ala., 1889), 39 Am. & E. R. Cas., 6, 11, 87 Ala. 501; and see same case again, 39 Am. & E. R. Cas., page 118; *United, Etc., R. Co. v. Dock Co.*, 52 N. J. Law 90, 44 Am. & E. R. Cas. 230; Lewis on Eminent Domain, §§ 267, 393, 513; *Sioux City, Etc., R. R. Co. v. Chicago, Etc., R. R. Co.*, 27 Feb. 77; 25 Am. and Eng. R. R. Cases, 150.)

The order of the court in reference to the Gagnon spur crossing was correct. (Fifth Division of the Compiled Statutes, §§ 600, 607; Constitution, § 5, Article XV; *State, Etc., R. R. Co. v. Minneapolis, Etc., R. R. Co.*, 39 Minn. 219; 35 Am. and Eng. R. R. Cases, 250, 259; *National Docks, Etc., R. R. Co. v. State, Etc., R. R. Co.*, 53 N. J. Law 217; 26 Am. St. Rep. 421; *Kansas City, Etc., R. R. Co. v. K. C., Etc., R. R. Co.*, 118 Mo. 599; 57 Am. & E. R. Cases 624; *East St. Louis, Etc., R. R. Co. v. E. St. L., Etc., R. R. Co.*, 108 Ill. 265; 17 Am. & E. R. Cases, 163, and note.) Also as to the Buffalo spur crossing. (*Chicago, Etc., R. R. Co. v. Kansas City, Etc., R. R. Co.* (Mo., 1892), 19 S. W. 826; 110 Mo. 510; 51 Am. & E. R. Cases, 542, note; *In Re Minneapolis, Etc., R. R. Co.* (Minn.), 39 N. W. 65; 39 Minn. 162.)

HUNT, J.—By this appeal we are called upon to decide questions of importance, not alone to the community at large, but especially so to railroad corporations, possessed of such powers as may be granted to them under the constitution and laws of the state.

The topography of Montana, as characterized by its name, renders it of unusual significance that the laws of eminent domain be correctly expounded at this comparatively early period of the development of the state.

The strict limits of all delegated authority to take the property of another must be cautiously and accurately guarded, lest private rights or those conferred be unnecessarily invaded. On the other hand, if the power to take has been delegated,

that power must be precisely defined and upheld by the courts, as one vitally affecting the material interests of the state.

The ways for railroads to reach remote mining camps, sometimes lying within small areas, upon precipitous mountain sides, at unusual altitudes, and in steep and rocky sections, are often very few, and only feasible at all by skillful engineering and vast outlays of money. Where, therefore, two or more railroads, in their mountainous routes, may seek the same objective mineral districts in view of their probably necessary juxtaposition, their rights must be carefully established with relation to the law as applied to the physical, as well as other and more general, conditions controlling them in their obligations towards one another and to the public as well.

Two main propositions are presented for review: First. Are plaintiff's road and branches public uses? Second. Can the plaintiff company construct its road within the defendants' right of way, and is plaintiff's use of the ground a more necessary use than that of the defendant companies, and is the ground sought to be taken necessary to plaintiff's use, and not necessary to defendants' use?

It is well established that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material. (*Talbot v. Hudson*, 16 Gray 417.) The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. (*Phillips v. Watson*, 63 Iowa 28; *Lewis on Eminent Domain*, p. 241; *Shaver v. Starrrett*, 4 Ohio St. 496; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461; *Randolph on Eminent Domain*, § 56.)

The circumstance that the plaintiff road was built by a private corporation, and that its branches run within convenient contiguity of private mines or ore houses, does not materially affect the road and give a private character to its use or to the use of its spurs. All termini of tracks and switches are more or less beneficial to private parties, but the public character of

the use of the tracks is never affected by this. "It may be in such cases that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturer; yet, if there is no exclusion of an equal right of use by others, and the singleness of use is simply the result of location and convenience of access, it cannot affect the question." (*Chicago Dock Co. v. Garrity*, 115 Ill. 155; *Chicago B. & N. R. Co. v. Porter*, 43 Minn. 527; *St. Louis & M. S. Ry. Co. v. Petty*, 57 Ark. 359; 20 L. R. A. 434.)

The force of these observations is peculiarly apparent in a new mining state. Frequently, railroads are extended by spurs or lateral connections of main lines, or by independent lines, into mining camps where but a single mine is developed and capable of shipping freight. Such roads or spurs are not infrequently built by the private enterprise of those interested in the one mine to be benefited, and when constructed it is intended that the tracks will be used almost wholly by the mining company which constructed the spur. The supposed barrenness of the country contiguous to the road, or the undeveloped condition of the mountain in which the mine is lying, or, perhaps, the hitherto unrewarded search of the prospector, has encouraged the belief that, apart from the single mine owned by those who have built the railroad, there are no other paying properties upon which a railroad might rely for ores or supplies to transport. * Such expected limited uses are but the results of the location of the mine and its inaccessibility. They do not in any way, however, exclude an equal right of use by others, perchance, desiring to ship freight or secure transportation over the road. To better illustrate our meaning, we have only to modify the instance just referred to of the railroad lateral built to a single mine. Suppose that a pioneer prospector has located and represented a claim contiguous to such railroad, but by reason of the impracticability or expense of constructing a wagon road, he has been obliged to simply keep what he believed was a good mine, hoping that in the future railroad facilities would afford him the opportunity to haul his ore to market. Suddenly, by the enterprise of others, and without any

expectation on their part of aiding any project other than their own, a railroad is built, and he may attain the fruition of his hopes if he can use the railroad to ship his ore. Could it be contended with any merit that the railroad company, incorporated under the railroad laws of the state, can discriminate against him by saying, "We are a private enterprise, for private use, and are not generally open to the public, and for this reason refuse to haul your ore, or to bring your machinery and supplies into these hills, and you cannot compel us to act otherwise?" Or, to carry the illustration further, suppose many mines are located close to the new line of road, and a mining district opened of incalculable interest to the state, a town springs up, with its diversified trade relations, and that thus the railroad originally constructed and intended to subserve the single mine, with little or no thought of any greater use, may become a measure of great utility to many people; must this development stop, or be dependent upon the caprices or will or discriminatory orders of the incorporators or owners, based upon a claim that the road was constructed for private purposes, and cannot be made to answer the demands of the public?

We say, after full deliberation, that the express command of section 5 of article XV of the constitution, that "all railroads shall be public highways, and all railroads, transportation and express companies, shall be common carriers, and subject to legislative control," etc., supplemented by the statute (section 680, p. 809, div. 5, Comp. St. 1887) authorizing the construction of side tracks, branches, etc., has made them instruments of public service as well as private profit, and is sufficiently comprehensive to include, not only the railroad used to illustrate our views, but, by analogy, the particular railroads of appellants and respondents in their main lines, lateral branches, and spurs, to particular mines in and about the numerous mining dumps, shafts, and ore houses described in this suit, and situate upon the hills adjacent to the city of Butte. (*Getz's Appeal*, 3 Am. & Eng. R. Cas. 186.)

Furthermore, it is expressly provided by section 7, article

XV, of the constitution, that "all individuals, associations and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers * * * shall be made * * * between persons or places within this state. * * * No railroad or transportation company * * * shall give any preference to any individual, association or corporation in furnishing cars or motive power, or for the transportation of money or other express matter." This provision, when considered with the previous one quoted, also demonstrates that the constitution, in its letter, its spirit, and its policy as well, classes all railroads, with their feeders, such as respondent and appellants operate, as public highways, subject to use by the public of right, amenable to the laws governing common carriers forever forbidding all obnoxious favoritisms between any who desire to use such highways. (*St. Louis & M. S. R. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 334.) This stable written policy is doubtless the outgrowth of pernicious systems of discrimination and preference which railroad corporations may have indulged in throughout the land where their powers are unrestrained by constitutional or other restriction. It puts them all on a plane, and under the facts before us, respondent and appellants, as public highways, are alike the beneficiaries of its liberality, subject, nevertheless, to its restrictions and liabilities.

Chief Justice Hawley, for the supreme court of Nevada, vigorously discusses a "public use," as meant by the constitution of that state, and concludes that the necessities of the business of mining, milling, smelting, etc., are of direct interest to the people of Nevada, and that a statute of that state is constitutional which authorizes land to be condemned for the necessities of such business. (*Dayton Mining Co. v. Seawell*, 11 Nev. 394.) This decision was afterwards expressly affirmed in *Overman S. M. Co. v. Corcoran*, 15 Nev. 147, and again recently approved by its learned author, in the United States circuit court for Nevada, where the court upholds a

statute authorizing the appropriation of land for a mining tunnel as a proper exercise of eminent domain, on the ground of "great benefit and advantage to the mining industry." (*Douglass v. Byrnes*, 59 Fed. 31.)

The supreme court of Georgia held in *Mining Co. v. Parker*, 59 Ga. 419, that a section of an act of the legislature incorporating a gold placer mining company, and giving it power, under the constitution, to take the private property of the complainants for the use of their ditch for the purpose of extending the same to their own land, on payment of just compensation therefor, was constitutional. "Gold and silver," say the court, "is the constitutional currency of the country, and to facilitate the production of gold from the mines in which it is imbedded, for the use of the public, is for the public good, though done through the medium of a corporation or individual enterprise."

In a comparatively recent decision (*Oury v. Goodwin*, (Ariz.) 26 Pac. 376), the court sustained an act of the territorial legislature permitting the condemnation of appellant's real estate for the purpose of an irrigating canal, basing their opinion upon the principle that a state may, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation.

The Nevada and Georgia cases have been disapproved of by Lewis on Eminent Domain (§ 184), but the disapprobation is based upon the ground that a law which granted a right of condemnation for a purpose singly and essentially private in its nature could not possibly subserve any public use or be of any public benefit, and hence is an invalid attempt to take private property for private use, and not upon the soundness of the argument that the magnitude of the interest of a state may be considered, for which alone we cite them. The reasoning of these cases, however imperfect the application to particular facts may have been, is well sustained. (Randolph on Eminent

Domain p. 50; Wood, R. R. p. 822; Mills on Eminent Domain § 20; Cooley Const. Lim. 533; *Hibernia Railroad Co. v. De Camp*, 47 N. J. Law, 518; 1 Rorer R. R. § 409; Comp. St. Mont. 1887, § 1495 *et seq.*)

The public interests are benefited by railroads, and the right of eminent domain may be exercised through the medium of corporate bodies. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare. (*Beckman v. Railroad Co.*, 3 Paige 45; Lewis on Eminent Domain § 170; *Dietrich v. Murdock*, 42 Mo. 279.)

Where the general public advantage is greatly promoted by the improvement of water power in the streams and waters of a country, private property taken for that purpose is taken for a public use, within the meaning of that term. (*Hazen v. Essex Co.*, 12 Cush. 475.) Indeed, in New England we find the courts very emphatic upon the question. Chief Justice Perley, after speaking of the interests that New Hampshire had in the improvement of her natural water powers, wrote as follows: "No state of the Union is more interested than ours in the improvement of natural advantages for the application of water power to manufacturing purposes. Nature has denied to us the fertile soil and genial climate of other lands, but by way of compensation has endowed us with unrivaled opportunities of turning our streams of water to practical account. The present prosperity of the state is largely due to what has already been done towards developing these natural advantages; and there is no assignable limit to our resources in this respect, if extended and connected enterprises for the improvement of the water power in the state should be successfully prosecuted hereafter. In no part of the world have the public a deeper interest in the success of all undertakings which promise to assist in the development of these great natural advantages. Whether, therefore, we look to the interpretation which has been given in other jurisdictions to the term *public use*, in

reference to the right of taking private property for such a use, to the legislative practice under the provincial and state governments before and at the time when the constitution was adopted, to the language of the constitution itself, to the early and continued legislative practice under the constitution, to the decisions of the courts in this state, or to the character of our business and the natural productions and resources of the state, we are drawn to the conclusion that the legislature have power to authorize a private right that stands in the way of an enterprise set on foot for the improvement of the water power in a large stream like this river to be taken without the owner's consent, if suitable provision is made for his compensation, and that the act of 1862 is constitutional and valid." (*Manufacturing Co. v. Pernald*, 47 N. H. 444; *Olmstead v. Camp*, 33 Conn. 532. See, also, *Scudder v. Falls Co.*, 1 N. J. Eq. 695; Mills on Eminent Domain § 183.)

So vital to the development of the agricultural interests of the state is water for irrigation that, as a part of the bill of rights of the constitution, it is provided: "The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs, necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in a manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited. (Const. Mont. art. III, § 15.)

The improvement of Boston harbor by reclamation of a large body of land for commercial purposes was held to be of great public advantage. (*Moore v. Sanford*, 151 Mass. 286.)

"The ever-varying condition of society is constantly pre-

senting new objects of public importance and utility, and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being." But the underlying principle remains, that there must be a public use or benefit. "But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule." (*Scudder v. Falls Co.*, 1 N. J. Eq. 695; *Talbot v. Hudson*, 16 Gray 417; *Buffalo & N. Y. R. Co. v. Brainard*, 9 N. Y. 109.)

In thus ingrafting upon the law of this jurisdiction the doctrine that the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks, and spurs to mines and mining works, as public uses, by virtue of the law of eminent domain, we are always duly mindful, not only of the constitutional guaranty of the individual right of possessing and protecting property, but are equally impressed with the declaration that "the good of the whole" is the very foundation of the constitution. Indeed, it may be said that upon this latter axiom of all government by the people rests the principle itself. The force of the principle may vary in different communities. What cogently applies to Montana, with its mountains and quartz, would be an absurd process of reasoning to urge in Louisiana, where scarce an undulation marks the surface, or a mineral lies beneath it. Therefore, to correctly define what that force is in the case before us, it is eminently reasonable and appropriate that the conditions of the whole people to be affected should be considered. In this state, where, almost wholly through the facilities and advantages of railroads, the quartz mines have been developed to such an extent that the mineral output is only exceeded by that of one or two older mining states, the publicity of the use of railroads into the camps is too obvious to require more extended comment. In the language of the eminent counsel who so lucidly presented respondent's side of the case: "Again, in Montana, mining is the dominant industry. Throughout a large portion of the state, and in the county of

Silver Bow especially, it is the all-important pursuit, upon which all other industries are dependent. In the mining, smelting, and reduction of ores the great mass of the population finds employment and support. The prosperity of the state is very largely due to the development of the mines."

Having determined that the respondent's railroad and laterals, branches and spurs are all public highways, within the legal bounds of public uses, it follows that the law of eminent domain was available to them, provided: "(1) The use to which the respondents have applied the ground taken is a use authorized by law. (2) That the taking was necessary to such use. (3) If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use." (Code of Civil Procedure, § 601.)

That a necessity exists which requires property to be taken is obvious. This follows as a conclusion of the determination that the purpose of the plaintiff is a public use. (*Moore v. Sanford*, 151 Mass. 286.) But, insist the appellants, although we grant a right of way is necessary, if it is held that the Butte, Anaconda & Pacific Railway is a public use, nevertheless, at the very threshold of this branch of the case we deny the necessity of the particular land for the railroad uses for which respondent seeks to appropriate it.

The district court found that the ground included within the defendants' right of way was necessary to the plaintiff for the proper construction and maintenance of its road, that such ground was not necessary for the use of defendants' railway, and was not in actual use by them at the time of the order, and that the use for which the plaintiff sought to condemn the same was a more necessary public use than any use the defendants have or could put the same to.

Without more prolixity than we think is essential to make clear our opinion, we will state the concluded facts apparent to us. The country through which the contending railroads run is one of the mountains of the main Rocky Mountain range, and known as the "Butte Hill," above the city of Butte. The railroads about the hill are really great broad-gauge spurs

of their respective main lines. From these great spurs many short ones project, running to ore house or mining shafts. The principal object of both railroads, in their branches about the "Hill," is to haul ores from and supplies to the several quartz mines indicated upon the map, to wit, the St. Lawrence, Anaconda, Wake Up Jim, Buffalo, Moscow and others. The Butte, Anaconda & Pacific (respondent) tracks for the most part lie north of the Montana Union tracks. The Montana Union right of way was twenty-five feet on either side of the center of its tracks. It had, however, graded along the hill only to an extent a little more than necessary for the actual space occupied by its roadbed. In many places the hill is so very steep, or so rocky, or both, that the rails must have laid very close to the bluffs just north of the tracks. There was no actual use of such bluffs or other ground adjacent to the Montana Union tracks, nor could it actually occupy the same without heavy excavation work on the upper side. Commencing at a point on the hill within the limits of the Nipper quartz mining claim, the Butte, Anaconda & Pacific, with its road, was graded and excavated on the upper side of appellants' roadbed, and is within the right of way of the Montana Union for about a mile and a half. At places the south rails of the Butte, Anaconda & Pacific road are within ten feet of the northern rails of the Montana Union, but as a rule there is some seventeen to twenty-two feet between the centers,—that is, from the center of the Montana Union tracks to the center of the Butte, Anaconda & Pacific tracks. These distances, excluding the crossings, are sufficient to prevent any interference between the successful operation of the two roads. The strips of ground which the plaintiff would condemn and appropriate vary in width, the variance being evidently based upon what the plaintiff deems necessary for the operation of its road, considering the points to be reached, and the distance which would and must separate the two roads when constructed. Prior to the institution of this action,—that is, in 1893,—various lines and means of getting to the several ore houses marked upon the map were projected.

All these ore houses are at the same level as to the grade of the two roads; several of them, however, being below the level of the Montana Union main track. By the abrupt rise in the hill and its rocky character, and because of the necessity of the Butte, Anaconda & Pacific crossing divers spurs of the Montana Union, it is necessary that the right of way of the Butte, Anaconda & Pacific be laid down to the same level as the Montana Union. This necessity could only be obviated by requiring the Butte, Anaconda & Pacific to either cross the spurs of the Montana Union at grade, or construct its road high enough to go overhead or low enough to pass beneath the spurs. To go under them would require the plaintiff to undertake an engineering task so far beyond what is deemed practicable or reasonable that it need not be considered at all. To build its line overhead would compel the Butte, Anaconda & Pacific to construct its road at more than twenty feet above the crossings, so that, when it passed the ore houses which the two roads go to, the plaintiff's road would be useless, unless, after running beyond the ore houses, switch backs were constructed down the hill, by which they could reach the objective points. To follow this plan would require the plaintiff to run into the mountain at points beyond the ore houses, at enormous expense of construction, and right of way, probably; and the road, when thus constructed, would be very impracticable to successfully run or operate. If the Butte, Anaconda & Pacific constructed its line above the Montana Union, it follows that the cuts through which it would have to run would be very much heavier than its present line, and at their objective points it would still be necessary for the two roads to be within a few feet of one another. Another objection to running higher up the hill is that such a route would materially interfere with the operation of the mines on the mountain. In such case shaft houses would be cut through, dumping grounds intersected, and quartz-mining operations seriously interfered with. The route chosen was deemed by far the most feasible and practicable one. Other routes could have been selected, according to the engineers' evidence, but any practicable one

which might have been chosen would have crossed the main line of the defendants, as well as many of their spurs. The plaintiff, by going upon the right of way of the defendants, widened the cuts which defendants had already made in many places, but when we consider that the hill had remained in its natural state until further excavated by the plaintiff, it is plain that no material damage was done to the defendants by the plaintiff by the mere act of excavating as it did. On the contrary, such excavations are a benefit from a mere standpoint of construction. Upon one part of the right of way, lying within the Belle of Butte addition to the city of Butte, the natural physical obstacles to selecting another route were not so great as higher up the hill; but, in order to conform with the grade necessarily chosen to reach the point higher up the hill, the most practicable route was that selected through the Belle of Butte addition, particularly in view of the fact that, had they kept off the right of way of the defendants, the plaintiff would have been compelled to pay for a number of dwelling houses and the lots which they were on, and other parts of their line would have been affected.

An experienced engineer, Mr. N. C. Ray, testified in behalf of the defendants that he had, at a time long prior to the institution of this suit, and at a time when there were not so many houses about the foot of the hill, and not so many mines developed and ore houses built on the mountain, made a survey for another railroad, with a view of finding a practicable route. His proposed line ran on the south or lower side of the present Montana Union track. It was proposed by this route to make most of the crossings of the Montana Union spurs grade crossings. It appeared also that the Ray route, if followed, would necessitate for a long distance a retaining wall to be put up to maintain the slope of the Montana Union roadbed, and to keep it from falling over on the proposed roadbed. It would require very heavy fills or trestlework, and, withal, a scale of a map made when this projected route was first surveyed showed that there was not two hundred feet difference in the longitudinal conflict between the Ray route

and the present Butte, Anaconda & Pacific route and the Montana Union right of way, as they appear on the maps. The total length of the present lines is about three miles, or a little less. From certain given points there was, between such proposed route and the actual route of the Butte, Anaconda & Pacific, a difference of three-fourths of a mile, the greater length being the Ray route. The Ray route necessitated five grade crossings of the main track of the Montana Union, all of which, it satisfactorily appears, were more undesirable than an equal number of crossings would be over spurs. Moreover, the Ray line, if run at the time this litigation first arose, would have encountered buildings, shaft houses and dwelling houses which were not in existence when the line was first proposed. It would have been vastly more expensive, by reason of the enhanced value of the right of way, and we think it only fair to say that, as the conditions existed at the time that the testimony was taken in this cause, his route was impracticable. Moreover, the Ray route was not projected with a view to serving all of the the various ore houses touching plaintiff's and defendants' roads; the only branch appearing on the Ray map being to the High Ore house, and a branch to the Anaconda and the Humboldt.

One of the objections interposed by the defendants to the occupancy of their right of way was the difficulty of throwing out switches or side tracks to the north of the Montana Union, but the engineers swear that if they have distances to centers between tracks of twenty-two feet, there is room between the two tracks for another track, and if the Butte, Anaconda & Pacific elevation is so high that the Montana Union cannot get over by crossing at right angles, a spur can be run at any distance in order to attain the proper elevation.

Another objection vigorously urged was the difficulty of handling ties where the roads were very close together. But it appears that some of the greatest railroads in the country, notably the Pennsylvania system, have three tracks abreast, with centers of the two outside tracks twenty-two and one-half feet apart. Ties are successfully handled on such roads,

and we see no reason why they should not be upon the roads of the contending parties at bar. Besides, the hill, as it stood, was certainly a much greater obstacle to necessary conveniences in this respect than it is as excavated to a level with appellants' roadbed.

It was also urged that the right of way taken by the defendants was necessary in case of future double tracks or sidings, but as these needs are mere future possibilities, not based upon reasonably apparent traffic needs, we do not think the showing is strong enough to merit very serious consideration.

A great deal of testimony was also taken upon the inconvenience to the defendants in the operation of their trains at various crossings where the construction of plaintiff's road prevented the defendants from handling as many cars at one time as they could handle if the plaintiff's road were not in their way. Eliminating the consideration of the Gagnon, Buffalo, and Haggin spur crossings, which are referred to hereafter, we are constrained to hold that, as the law expressly gives the right of crossing and intersecting (Const. art XV, § 5), the interference is only such as is essential to any method of operation of two railroads where they cross and intersect one another on the side of a mountain, where their respective ways are necessarily very limited, and where both may have lawful rights of way to their respective but identical objective points.

It is well to bear in mind, in the application of the principles underlying the law of eminent domain, that the state has an inherent political right, pertaining to sovereignty and founded on what has been expressed to be a "common necessity and interest," to appropriate the property of individuals to great necessities of the whole community where suitable provision is made for compensation. (*Raleigh v. Davis*, 2 Dev. & B. 451; *Lewis on Eminent Domain* § 3.) This right, says the constitution of Montana (§ 9 art. XV), "shall never be abridged nor so construed as to prevent the legislative assembly from taking the property and franchises of incorpor-

ated companies and subjecting them to public uses, the same as property of individuals." The public welfare is therefore the particular base upon which must be laid the correct application of the doctrine itself. The right of eminent domain may be of the greatest value to the respondent, or to any other corporation which may exercise its privileges, but that is an incident which must be subordinated by the courts to the question of public use, and to the consideration of the benefits to accrue to the public by the construction of the contemplated project. There is, however, a rule of construction, sustained by the great weight of well-considered authority, to the effect that this power to take the property of private citizens or other corporations for public use must be exercised and can be exercised only so far as the authority extends, either in terms expressed by the law itself, or by implication clear and satisfactory. (*In re City of Buffalo*, 68 N. Y. 167; *Sutherland on Statutory Construction* § 388; *Mills on Eminent Domain* § 46.)

In our opinion, the testimony in this case shows that the particular location of respondent's railroad is by far the most practicable which could have been found, and, considering the fact that any other route would have impinged upon the appellant's right of way very nearly as much as the present route does, and that such other route would have affected many mining operations, would have been enormously expensive, and much less convenient or somewhat less safe, and that it is manifestly to the best interests of the public generally that railroads be constructed throughout the mountains over such routes as will enable the public to receive the best and most expeditious service which can be attained, we think that the taking of the portions of the right of way of appellants' road was necessary to the use, which was public, of the respondent's railroad.

Now, however, having advanced to this point of the case, we are met with this argument by the appellants' counsel, namely, that this right of way was already appropriated, and that there was no delegation of power to any corporation under the emi-

ment domain laws of the state to take property already appropriated to a public use, unless, as provided by the last clause of the third subdivision of section 601, Code of Civil Procedure 1887, "the public use to which it is to be applied is a more necessary public use." We have already concluded that this land was necessary to respondent's use, and the question therefore is, is respondent precluded from condemning these necessary lands because they have already been condemned for public use by the appellants? If the question were limited merely to this single inquiry (unless some other statute authorized a taking), doubtless, under rules of construction, we should hold that the respondent could not invade the right of way of the appellants. But our legislature has imposed upon the court the additional responsibility of judicially determining whether the use to which the appellants did or would put the particular lands is a more necessary one to the public than that to which they have already been appropriated by the Montana Union Railway. We therefore find the whole proposition resolves itself under the facts to this: A part of the right of way of the Montana Union Railway Company has never been used by it for railroad purposes for the several years during which the road has been constructed and in operation, and is not reasonably requisite for future uses. The Butte, Anaconda & Pacific Railway Company, in the location of its only really practicable route, desires to take parts of such unused portions of the Montana Union right of way; such portions being necessary for their actual use, and unnecessary for the actual use of the appellants.

We have used the word "necessary" advisedly throughout this opinion, although when we say that the route chosen by the Butte, Anaconda & Pacific requires the taking of the lands in question as necessary for public use, we do not mean that there is an *absolute* necessity of the particular location they seek. But, under the statute, such an absolute necessity is not a prerequisite to the exercise of the law of eminent domain.

We are aware of the decision of the supreme court of Pennsylvania (*Sharon Railway Co's Appeal*, 122 Pa. St. at page

545), that land once appropriated by a railroad company to public use under the right of eminent domain cannot afterwards be appropriated by another company to the same use, except in case of "absolute necessity." There one road sought to take part of the yard of another. The facts warranted a finding by the master that the lands sought to be taken were convenient and necessary to enable the plaintiff company to economically and expeditiously carry on its present and prospective business, and it was upon such a finding that the court held as it did. If the learned judges meant by an absolute necessity to exclude entirely the element of reasonableness in the measure of their words, we are constrained to take a different view of the law in interpreting our statute, and in so doing we find ourselves in thorough accord with three of the justices of the same court in their dissenting opinion, reported in *Appeal of Pittsburgh J. R. Co.*, 122 Pa. St. 511, and decided just two years before the absolute necessity rule was laid down in the case hereinbefore cited. The appeal in the *Pittsburgh Junction Co.* case in its facts was much closer to the case at bar than *Sharon Railway Co.'s Appeal*, *supra*. The Allegheny Valley Railroad Company claimed to own certain property in the city of Pittsburgh, extending from Forty-Third street to Forty-Seventh street, and from an unnamed street on the south to low-water mark on the Allegheny river on the north, all of which property it claimed to have in constant use in connection with the operation of its railroad. The Pittsburgh Junction Company entered upon a part of this property, and commenced to lay ties and rails thereon, and to tear up the track that had been used by plaintiff for many years, and it was alleged that, if the defendant was permitted to go on, it would seriously interfere with and cripple the operation of the plaintiff's road, and would ruin its roadbed, and render it unable to perform the duties imposed upon it towards the public. The defendant contended that it was authorized to locate its road between certain points, and it was obliged to run along the bank of the Allegheny river, and that it had a right to run where it did, and denied that all of the

property used by the plaintiff in connection with the maintenance and operation of its railroad was used, or that it was all indispensable to plaintiff's use. The supreme court held that the plaintiff road could consider the needs of the future, and that the defendant could not interfere with the present or future use contemplated by the plaintiff, and that no actual encroachments would be allowed. Perhaps the decision turned, in the opinion of the majority of the court, upon the ground that the defendant could have, without any trouble besides expense, constructed its road at another point, as the court say: "We are not embarrassed with the questions that would arise if the defendant company could not build its road without laying its track through the plaintiff's yard." The minority opinion by Judge Tounkey is very brief, and we quote so much of it as is applicable to the facts at bar: "In this case the testimony clearly shows, and it was so found by the master, that there is ample room next the river where the appellant could lay its tracks without material injury to the property of the appellee. The inconvenience to and cost of changes by the appellee could be compensated in damages. The prudent appropriation of a parcel of land extending from low-water mark on the river to the hillside by the appellant, the whole of which land is not necessary for the uses of its road, ought not to bar the construction of another railway in the valley by a company subsequently chartered."

About the same time that the Pennsylvania rule of absolute necessity was announced, the supreme court of Alabama, in *Mobile & G. R. Co. v. Alabama M. R. Co.*, 87 Ala. 501, discussed, with a learning which generally characterizes the decisions of that respected court, the right of a railroad company to take by condemnation proceedings part of the property of another railroad company already devoted to a public use, and say: "As a general rule, a corporation to whom the right of eminent domain is delegated, having the right to locate the line of its road between the terminal points, has also the correlative right, to some extent, to select the lands to be taken. But the discretion must be reasonably exercised, so as to cause

as little damage as is practicable; and if abuse in the selection is made apparent, the court before whom the proceeding is pending should interfere to control the discretion, and prevent the abuse by refusing an order of condemnation. (*New York Central & H. R. R. Co. v. Metropolitan Gas-Light Co.*, 63 N. Y. 326; 6 Am. and Eng. Enc. Law, 541.) According to the rule stated above, the liability of any portion of the right of way of the Mobile & Girard Railroad Company, though not in actual use, to condemnation for the use of the Alabama Midland Railway Company, is subject to the qualification of a necessity therefor. It would be difficult to lay down any specific rule, as to the measure of the necessity, of sufficient scope to include all cases. It may be observed generally that *necessary*, in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite and proper for the accomplishment of the end in view, under the particular circumstances of the case. On the evidence, there is little room for doubt that the route selected by the Alabama Midland Railway Company to get into the city of Troy and out to the west is the most practicable, if not in its proper sense the only practicable, route." (*Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co.*, 82 Ala. 297.)

Again, the absolute necessity rule not only will not consist with the express delegated authority to take the property of a corporation by virtue of eminent domain, but, if we carry it to its logical results, it is this, that where one corporation to which has been granted the right of taking property by eminent domain has exercised that right, it cannot be interfered with, except for crossings and intersections. This is fallacious. In mining districts it leads to exclusion. When a similar question arose in Illinois, Judge Breese, for the court, thus tersely disposed of it: "The argument, when reduced to its proper measure, is that, while the land of all other persons and corporations lying on the route of a railroad is subject to the power of eminent domain, that belonging to a railroad company is not thus subject. Such land must remain intact. We cannot assent to this proposition." (*Peoria, P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174.)

We find the federal court for the district of Colorado taking substantially the same view of the necessity rule as the Alabama court did. (*Colorado E. Ry. Co. v. Union Pacific R. Co.*, 41 Fed. 293.) The Colorado Eastern Railway Company sought to condemn certain property within the limits of the city of Denver, claiming that the ground was necessary for its use for various railroad purposes. The defendant contended that the land was not of such necessity to the plaintiff as to justify the taking from defendant, and that the land had already been appropriated by defendant to its own use as a public railroad, and was eminently necessary to its prospective business. Philips, J., decided that the ground was necessary to the petitioner, because it was the only piece of ground available to the petitioner without entirely changing the survey line and undertaking to accomplish its destination by a circuitous route, and that it would not be a wise judicial discretion to compel the petitioner to adopt a road highly inconvenient, longer, and less available. It was plain in that case that another route could have been selected, and, aside from the matter of economy, with very much more ease than could the respondent, in the case at bar, choose another route for the Butte, Anaconda & Pacific road; but the court evidently refused to follow the absolute necessity rule, and based its decision upon the more just doctrine of the necessity of the petitioner, founded upon the practicability, economy, facilities, and other considerations which should govern the determination of what the necessities may be, always considering the rights of the senior company, yet never forgetting the benefits to the public.

The laws of the state authorized the respondent to locate its railroad. It had a right to select the most feasible route, provided in doing so it did no unnecessary injury to the public or to the appellants. The law does not give to the respondent any predominant right over the appellants, though certainly the line of respondent should be so run as not to materially interfere with the efficiency of the Montana Union. (*New York, H. & N. R. Co. v. Boston H. & E. R. Co.*, 36 Conn. 196.)

We find no violence done to these principles. The inconveniences inevitably incident to the crossing of one road by another are not violations of the principles. On the other hand, lands belonging to the Montana Union by way of easement and not actually in use by such company, or not actually necessary for the enjoyment of their franchise, should be upon the same footing as the land of the individual citizen. (*Pecria P. & J. R. Co. v. Peoria & S. R. Co.*, 66 Ill. 174.)

It was never contemplated by the constitution that competition between railroads should not be sanctioned. On the contrary, our construction of the law is that it is the policy of this state, voiced in its constitution and statutes, to build up competing roads, rather than to deter them. If this were not so, why did the legislature expressly include the right to take lands already appropriated by one corporation and devote them to public use where the latter use was a more beneficial one than the former? The mere fact that the easement is held by a corporation, and that another corporation takes it to subserve public use, cannot affect the principle so long as the second taking is for the greater public good. (*Northern R. Co. v. Concord & C. R. Co.*, 27 N. H. 183.) Nor can the claim of a superior equity of respondent be urged as a sound argument, based upon the fact that the appellants already have appropriated the property for public use. (*Chicago, R. I. & P. R. Co. v. Town of Lake*, 71 Ill. 333.)

The Montana Union accepted its easement with the reserved right in the state to retake it whenever the public necessity might require, provided, always, just compensation should be made when it might be retaken.

One public corporation cannot take the lands or franchises of another public corporation in *actual* use by it unless expressly authorized to do so by the legislature. But the lands of such a corporation not in actual use may be taken by another corporation, authorized to take lands for its use *in invitum*, whenever the lands of an individual may be taken, subject to the qualification that there is a necessity therefor. (2 Wood R. R. p. 856.)

We think this to be the true rule, and that opposing corporations may be limited to the enjoyment of that property in *actual* use by them, and that which is reasonably necessary for the safe, proper and convenient management of their business, and the accomplishment of the purposes of their creation. (*Mobile & G. R. Co. v. Alabama M. R. Co.*, *supra*.)

Upon this proposition we again refer to the opinion of Judge Phillips (*Colorado E. Ry. Co. v. Union Pacific Ry. Co.*, 41 Fed. 293), where it was held "that mere priority of acquisition, or even of occupation, gives no exclusive right, except in so far as the condemnation trenches on the greater necessities of the other franchise." As has been stated heretofore in this opinion, the right of way prayed for by the respondent in this case was not occupied, and the mere priority of the acquisition of the Montana Union must give way, under our laws, to the superior uses and greater needs of the Butte, Anaconda & Pacific Company, as more necessary to the public.

The learned counsel for the appellants have cited us to many cases besides the Pennsylvania ones already referred to. We will notice one or two principal ones. *Barre R. Co. v. Montpelier & W. R. R. Co.*, (Vt.) 17 Atl. 923, simply decided that one railroad company, to avoid a sharp curve in its road, could not take the land of another company, as condemnation was sought upon the ground of convenience rather than necessity. We find nothing in the case to the effect that if the necessity existed still the ground could not be taken.

Boston & M. R. Co. v. Lowell & I. R. Co., 124 Mass. 368, was decided upon the ground that there must be an express legislative grant to authorize a longitudinal road to be built upon the right of way of another road, and that the statutes did not contemplate such a taking, but the court recognized that cases may arise where the authority to take land already devoted to another railroad may be implied, either by the language of the act or from the application of the act to the subject-matter, as where the railroad could not be laid, in whole or in part, by reasonable intendment, on any other line.

We are cited by the appellants to the case of *Illinois Cent.*

R. Co. v. Chicago, B. & N. R. Co., 122 Ill. 473, 13 N. E. 140. In that case one railroad sought to run within the right of way of another for a distance of eleven miles. A majority of the court held that one company could not take any part of the right of way of another except at a point of crossing, intersection, or union. The Illinois statute granting rights of way to railroad companies was substantially like the first portion of the fourth sub-division of section 600 of the laws of eminent domain (Comp. St. Mont. 1887, page 216), which is as follows: "All rights of way for any and all purposes mentioned in section 598, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way, or improvements or structures thereon."

It was argued to the court that the provisions of such a statute were broad enough to permit the taking of the right of way of one company by another, but it was decided that the taking contemplated was limited to crossings, intersections or unions, and not taking for another road longitudinally. Two judges dissented from that opinion, and although we do not find it necessary to approve or disapprove of the law of that case, we note that our statute seems to go further than the Illinois law, for with us it is expressly provided, in the latter part of the section just quoted: "They shall also be subject to a limited use in common with the owner thereof when necessary; but such use, crossings, intersections and connections shall be made in a manner most compatible with the greatest public benefit and least private injury." If the property to be subject to limited use in common with the owner means, generally, rights of way, longitudinal as well as others, and the statute does not restrict the application of the pronoun "they" to rights of way immediately connected with crossings and intersections, but enlarges the use of all rights of way when necessary, it would seem by no means unreasonable that conditions like those presented in the case under consideration were in the minds of the legislature at the time that this sec-

tion became a law, and that of necessity all rights of way shall be subject to a limited use in common with the owner thereof.

Perhaps the statute may have meant, by using the word "owner," the owner of the fee, to whom all rights in the property might revert if there were no longer any public use thereof, or it may mean the easement for use of the corporation which had acquired an easement over the property by virtue of the law of eminent domain. We simply refer to this matter in view of the citation made.

From the decision in the case of *Railroad Company v. Moss*, 23 Cal. 323, it appears the court did not consider the effect of any statute similar to ours granting the right to take land once appropriated, if indeed there was any such statute in existence in California when that decision was rendered in 1863. It was held that there was no right to condemn or appropriate land along or upon a previously located line of another railroad company, except for crossing purposes. The court announced that, by its priority of location and appropriation, a railroad company acquired a "vested right to its line of road and the land necessary for its construction, as prescribed by the railroad laws, of which it cannot be divested by another company who seek to appropriate the land for the same use." We must decline to assent to this proposition as it is stated, without careful qualification and modification.

We cannot agree that the statute which authorizes lands to be appropriated for a more necessary public use means a different public use in all cases. If the legislature had intended that construction to be put upon the statute, instead of carefully restricting the right to a more necessary public use, they could easily have said a different public use. Besides, the view which we have discussed is consonant with those clauses of the constitution inhibiting discriminations, as already enumerated. If the appellants' construction were adopted, the practical result would be the exclusion, oftentimes, of more than one railroad on mountain sides or in mountain gorges or precipitous gulches, or routes not embraced within the definitions of canyons, defiles, or passes, especially pro-

vided for by law. (Comp. St. 1887, div. 5, § 688, tit. "Railroad Corporations.") Consider a practical application. A railroad company would take the maximum right of way. Now, if the right of eminent domain is not conferred upon the junior company to take lands for a public use, unless for a different use, the first railroad would be enabled to prevent any and all competition, because, oftentimes, any route off the right of way of the first would be, if not an absolutely impassible one, so impracticable and so enormously expensive, that it must as a reasonably necessary consequence deter another corporation from building at all.

To conclude, we adopt that construction which is more jealously careful of the best interests of the state, and say that, where a railroad company traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and spurs, and not used by it in connection with any such operations, and in all reasonable probability not necessary for any such future use, if another road seeks the same objective points, and in doing so is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious damage to many mining properties in their subterranean and surface operations, and withal would be obliged by the topography of the mountains to parallel the adversary road a part of the way, under such conditions the use of the unused parts of the right of way of the one company by the other is a more necessary public use than that to which such unused portions are already appropriated. Wherefore, the law will permit the taking, regarding the interference as a "tolerable one," to be compensated by damages to be paid. (*In re City of Buffalo*, 68 N. Y. 167.)

In concluding this opinion the court expresses its acknowledgment for the argument and research of counsel on either side. By their aid we have been greatly assisted to determine between the parties whether plaintiff could invoke the law of eminent domain in this case,—that power in the exercise of

which, a modern writer (Randolph) says, is invariably provoked a direct issue between man and the state.

SPURS AND CROSSINGS.

Gagnon Spur Crossing. The order of the district court in relation to the Gagnon spur is more fully set forth in the statement of facts appended to this opinion. Its use to the defendants was for the delivery of supplies and fuel to the Gagnon mine. It was on the north side of the Montana Union track, while the mine is on the south side of the track and at such a distance from the railroad that supplies are hauled by wagon from the spur to the mine. Where the plaintiff's track crosses the Gagnon spur it is at the same level as the defendants' track, but the spur descends from the time it leaves the Butte, Anaconda & Pacific track and the grade of the plaintiff's track at the point of crossing is considerably above the spur grade. In view of the fact that it would be plainly for the greater convenience of the appellant company to have the spur on the south side of their main track, the order of the district court in relation to this spur is modified, and unless plaintiff and defendants otherwise agree, the order of the district court will be that the Butte, Anaconda & Pacific Railway Company, at its expense, construct a spur, or rebuild the one already constructed upon the south side of the Montana Union main track; and, further, that the said Butte, Anaconda & Pacific company at its own expense construct and provide suitable and convenient approaches to said spur for teams and wagons, having due regard to the nature and facilities of transportation between the Gagnon mine and the Montana Union Company.

Buffalo Spur Crossing. There is a slight difference of elevation of grades of the two roads at the Buffalo spur. The only practicable way of crossing at the point marked F on the map was to raise the grade of the track of the respondent from the switch of the main track as far as the crossing by the Butte, Anaconda & Pacific. No change was to be made on the main line, and the grade of the spur is to be the same as formerly

from the crossing to the end of the spur. We think that the respondent should construct this crossing in the manner proposed, and at their expense entirely, unless it is agreed otherwise between the parties themselves.

Haggin Spur Crossing. The civil engineers take very different views of the feasibility of this crossing. A short distance from the crossing the Butte, Anaconda & Pacific Company found it necessary to construct a reverse grade leading to the Montana Union track. This made a "hump," as railroad men call it,—that is, an uphill and a downhill grade,—on the Butte, Anaconda & Pacific road a very short distance from the crossing. This, of course, was necessary to enable the Butte, Anaconda & Pacific to cross without disturbing the grade of the Montana Union track. The principal objection to it by the Montana Union witnesses was that it was impracticable and unsafe because of passing over the hump, and, considering the general grade of the railroad, the Butte, Anaconda & Pacific trains would break in two, and thus, by wreckage and other mishaps, the Montana Union tracks would be obstructed and their traffic materially interfered with. It is difficult for us to say, in the radical disagreements of skilled engineers, what the probable effect of this hump may be, but it occurs to us that, as its dangerous tendencies are all primarily towards accident to the Butte, Anaconda & Pacific, and only indirectly to the Montana Union, the risk, if any, and the scientific error, if any, will fall much more heavily upon the respondent than upon the appellants, and that therefore it is proper for us to affirm the order of the district court.

We see no error in referring the question of damages for crossings to the commissioners, as was done by the order of the court. The statute covers the matter. (Comp. St. 1887, p. 218, § 607.)

The last objection of the appellants is to the order of the court giving the power and authority to the Butte, Anaconda & Pacific Company alone to employ and discharge watchmen at the crossings, for whose wages the plaintiff and defendants are jointly responsible. In view of the fact that the respond-

ent company invokes the right to make these several crossings, it would seem quite just that the expenses of a watchman to guard the Haggin Spur crossing and others, if any, where the district court ordered watchmen, should be borne by the respondent alone. We see no objection to permitting the watchmen to be chosen by the Butte, Anaconda & Pacific Company, and it will be directed by this court that the order of the district court shall be modified so as to impose the expenses of watchmen entirely upon the respondent corporation.

Let the judgment and order of the district court be remanded for modification in conformity with the views expressed in this opinion, and when so modified it will stand as affirmed.

Modified and Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, RESPONDENT, v. THE MONTANA UNION RAILWAY COMPANY, ET. AL., APPELLANTS.

[Submitted June 19, 1895. Decided July 29, 1895.]

RAILROADS—Crossings—Changing grades—Storage tracks.—The right of a railroad to cross the tracks of another road will not be defeated merely because the crossing will require the grade of the latter's road to be raised a foot and a half at one point, where the crossing at such point is wholly practicable and the grade is made necessary by the distance and grade between other crossings. Nor will the right to so cross be defeated merely because it will somewhat curtail the latter's storage tracks.

SAME—Crossings—Switches—Changing right of way.—Where the district court had directed the plaintiff railroad which was seeking to cross the defendant's track at a point where it maintained a "three throw" switch, to move the defendant's switch North so as to allow the plaintiff's road to cross one track, instead of three, of the defendant's, and to procure title for the defendant road to the new ground necessary for the changed right of way, such order will be modified on appeal so as to require the plaintiff road to swing its road further to the north, and make if necessary, three crossings beyond the switch and thereby obviate the necessity of moving the defendant's switch off of their present right of way.

Appeal from Third Judicial District, Deer Lodge County.

ACTION by a railroad company to obtain an order permit-

ting it to cross the tracks of another road. Judgment was rendered for the plaintiff below by BRANTLEY, J. Modified and affirmed.

Shropshire & Burleigh and *Forbis & Forbis*, for Appellant.

M. Kirkpatrick, *W. W. Dixon* and *William Scallon*, for Respondent.

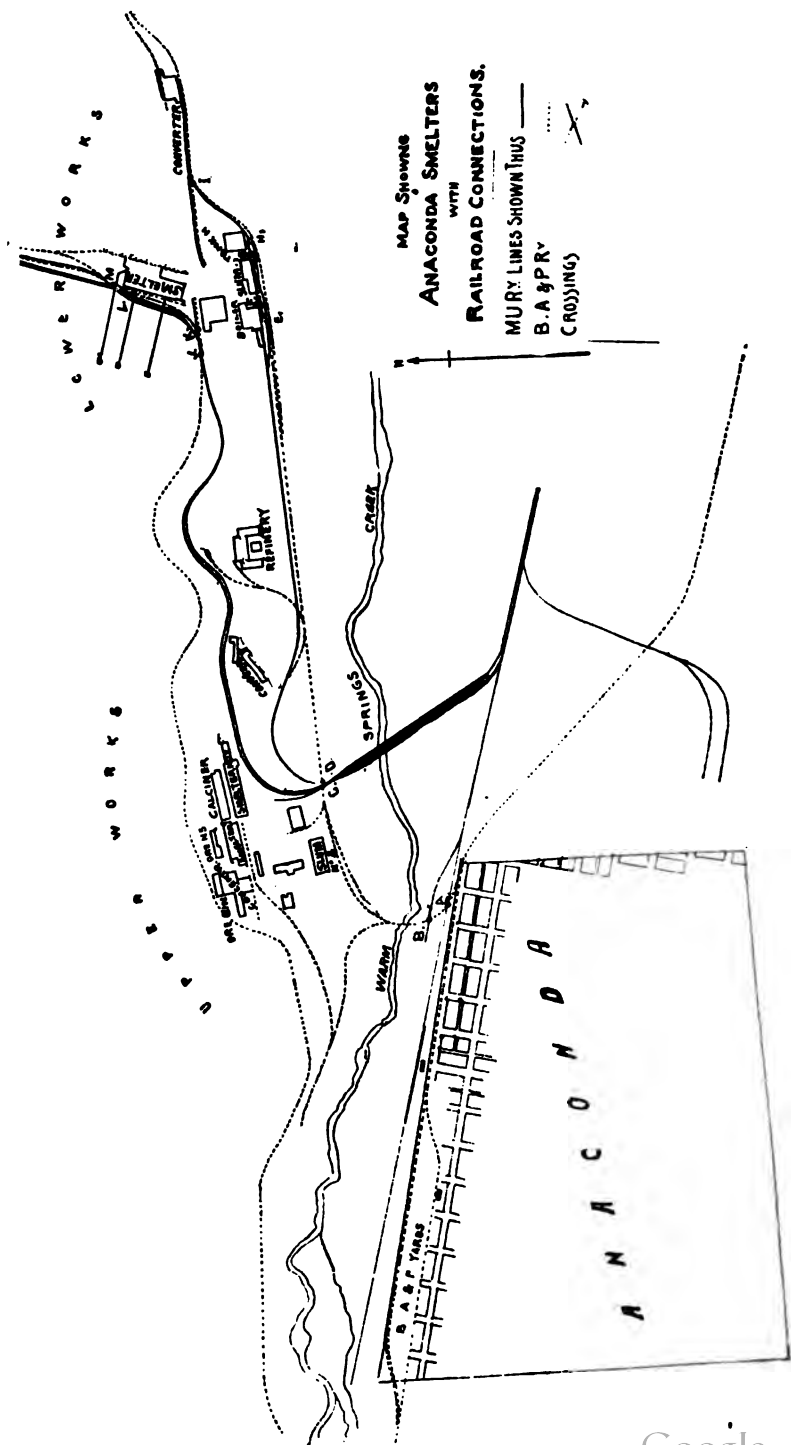
HUNT, J.—This case may be considered with reference to that of *Butte, A. & P. Ry. Co. v. Montana Union Ry. Co.*, ante, page 504.

The formal averments as to the corporate existence of the parties are the same, and like questions of the character of the use of the plaintiff's tracks arise.

The more direct object of this suit is for an order permitting plaintiff to construct certain crossings for its own railway, switches and side tracks, over the main line, switches, side tracks and spurs owned and controlled by the defendants, in and about the various smelting and concentrating works of the Anaconda Mining Company, situated north and east of the city of Anaconda.

The Butte, Anaconda & Pacific Railway Company wishes to reach the same objective points, mining and smelting works, that the Montana Union tracks extend to. To accomplish this, certain crossings of the Montana Union tracks must necessarily be made. The letters A, B, C, D, E, F, G, H, I, J, K, L and M show upon the map the points where plaintiff asks leave to cross, and the localities involved.

That the switches, side tracks and spurs of defendants and plaintiff are alike public highways, and that plaintiff has a right to cross, intersect or connect with defendants' main road, spurs and switches, in the manner provided by law, is decided by the opinion in the former case cited. It only remains, therefore, to inquire into the facts with a view of determining whether the crossings and intersections are made in a manner most compatible with the greatest public benefit and the least private injury.



The learned judge of the district court, accompanied by a civil engineer representing each party, made a careful personal inspection of the ground upon which the tracks are situated. He was thus enabled to critically apply the somewhat technical explanations of the witnesses to the physical objects directly in front of him. In his opinion, made part of the record, the crossings asked for were practicable. Certain of them, G and H, were disallowed, because to cross at the point G would carry with it the right to run a side track from F to G, longitudinally for some feet with defendants' tracks and upon their roadbed. This question was reserved. But no complaint being made by the respondent, the order of the court in this respect need not be considered. The order, in considerable detail, regulated the construction and location and method of operation of each switch. At one point, D, the Montana Union grade was raised a foot and a half, or a little more. It appears that the crossing in this manner is wholly practicable, and that the grade is necessary by the distance and grade between the triple crossings at C and D. Appellants object to other crossings, E and F especially, because they somewhat curtail appellants' storage trackage. But this was not so serious an inconvenience as to outweigh the legal rights of the respondent.

At the point J appellants had what is termed a "three-throw" switch, made of movable rails connecting the Montana Union track going up the grade towards mining works with three prongs. To have crossed the movable rails would have been a great injury to the appellants by preventing the use of their movable rails. To put the crossing further east plaintiff would have had to cross three tracks of defendants to reach the Anaconda works. The court, after seeing and considering the exact situation, ordered the plaintiff, at its expense, to move the defendants' switch north so as to allow respondent to cross one track, and not three, of the defendants'. The principal objection to this crossing seems to be the order of removal of appellants' tracks off their ground, rather than to any inconvenience or injury which may ensue there-

from. But it looks to us as if the crossing ordered would be made with less possible injury to appellants than elsewhere, and as the plaintiff was ordered to procure a good title to defendants for the necessary space for right of way over the new ground upon which it was permitted to construct the Montana Union three-throw switch, it is difficult to understand the real merit of appellants' objection, unless it be in the fact that the proposed change in the grade would slightly increase the curvature in one of appellants' tracks. It would seem, however, that a reduction of curvature in another track would equalize this. Nevertheless, in order to confine the plaintiff to changes of tracks within the rights of way already taken by the Montana Union, lest an unnecessary or unwarranted injury may be done by removing this switch to ground outside of that now lawfully occupied, we have concluded to modify the order of the court in relation to this crossing, by requiring the Butte, Anaconda & Pacific Company to swing its road further towards the north, and, if necessary, to make three crossings of the defendants' tracks beyond the switch, and thus obviate the need of moving the appellants' track off of their present occupied right of way at all. (*National Docks, Etc., Co. v. State*, 53 N. J. Law, 217, 21 Atl. 570; *East St. Louis C. R. Co. v. East St. Louis U. R. Co.*, 108 Ill. 265; *Kansas City S. B. R. Co. v. Kansas City, St. L. & C. R. Co.*, 118 Mo. 599, 24 S. W. 478; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506.)

That railroad crossings are inconvenient, particularly where they are on grade, and frequent, is indisputable. But the law in regarding railroads as public necessities has not extended its generous privileges to them altogether without some possible attending inconveniences. Among the latter are lawful crossings, intersections and connections of a rival company legally competing for the transportation of freight.

It is therefore ordered that that portion of the district court's order and judgment which permitted the three-throw switch of the appellants to be moved off its present right of way or roadbed to the north of its location at the time of the

institution of this proceeding, be set aside, and that, unless otherwise agreed between the parties, in lieu thereof the plaintiff is ordered to move its track or tracks to a point further north, with the right to cross the several tracks of the defendants at a point easterly and at a point beyond the movable rails of the defendant company.

The cause is remanded to the district court for modification in accordance with these views, and when so modified the judgment and order appealed from will be affirmed.

Modified and affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

KNATZ, RESPONDENT, v. WISE, APPELLANT.

[Submitted September 16, 1895. Decided September 23, 1895.]

16	555
140	471

WAGE WORKER'S LAW—Assignment for benefit of creditors.—Where there is no evidence in the record and the findings of the court bring the plaintiff within the operation of section 2050, *et seq.*, Fifth Division of the Compiled Statutes, known as the "Wage Worker's Law," a judgment for plaintiff against an assignee for the benefit of creditors will be affirmed on the authority of *Flanders v. Murphy*, 10 Mont. 398 and *Marshall v. Livingston National Bank*, 11 Mont. 351.

JUDGMENTS—Parties.—Where several parties are sued as assignees for the benefit of creditors and a partnership is alleged to exist between them, and it appeared from the findings that the assignment was not to the firm but to one of the partners individually, a judgment may be properly entered against the individual partner and the action dismissed as to the others, under sections 239 and 240, First Division of the Compiled Statutes, allowing judgment against one or more of several defendants. (*Comanche Mining Company v. Rumley*, 1 Mont. 201; *Wells v. Clarkson*, 5 Mont. 338, cited.)

INTEREST—Settlement of account.—An acknowledgment by an assignee for the benefit of creditors, of the correctness of a claim for wages against his assignor, upon receipt of the notice of such claim, constitutes a settlement of the account so as to entitle the wage worker to interest under a statutory provision allowing interest on money due on the settlement of accounts, from the day of such settlement.

Appeal from Third Judicial District, Granite County.

ACTION against assignee for benefit of creditors on wage workers claim. Judgment was rendered for the plaintiff below by BRANTLEY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This appeal stands upon the judgment roll, and the documents in the roll which are pertinent to this decision are the complaint, answer, findings, and judgment.

The complaint sets up that the defendants Meyer Wise, Charles Wise, Edward I. Goodkind, and A. L. Goodkind were copartners. It furthermore states that the plaintiff was working for wages for one Slick, in the town of Philipsburg; that prior to April 27, 1893, he had performed 53½ days' service for said Slick, at \$3 per day; that on said April 27th Slick was insolvent, and unable to pay his debts; that the firm of Wise & Goodkind were his creditors to the amount of \$600; that on said day he assigned and transferred all of his property, valued at \$1,500, to said Wise & Goodkind; that he notified defendants of the amount and nature of said indebtedness of Slick, and that defendants accepted such notice, and acknowledged the correctness of the claim; that said amount has not been paid.

As another cause of action he sets up that one Majers was also a wage worker for said Slick, and in a position similar to that of the plaintiff, and that said Majers assigned his account to him (the plaintiff.)

No demurrer was interposed to this complaint. The case was heard to the court without a jury, and the court found all of the facts in favor of the plaintiff, and all the facts which brought the plaintiff within the beneficiary provisions of sections 2050 *et seq.*, div. 5, Gen. Laws, known as the "Wage Workers' Law." The court found that the transfer made by Slick was an assignment for the benefit of his creditors. The finding, however, is that the assignment was made to Edward I. Goodkind, one of the defendants. Judgment was entered in favor of the plaintiff against Edward I. Goodkind, and the action dismissed as to the other defendants. As noted above, the appeal is from the judgment, and the record before us is the judgment roll only.

F. N. & S. H. McIntire, for Appellant.

H. R. Whitehill, for Respondent.

DE WITT, J.—The defendant, in his brief, contends that the facts in this case distinguish it from the cases of *Flanders v. Murphy*, 10 Mont. 398, 25 Pac. 1052, and *Marshall v. Bank*, 11 Mont. 351, 28 Pac. 312. But there is no evidence in the record, and we have no means of distinguishing the facts herein from those in the cases cited. The findings clearly bring this case within the two cases cited, and the judgment on the general proposition must be affirmed, on the authority of those decisions.

The only other question left is as follows: Appellant contends that the plaintiff sued the defendants as a copartnership, and that the court was not justified by the pleadings in entering judgment against Edward I. Goodkind alone, and dismissing as to the others. It is to be observed at the outset that while it is alleged that the defendants are partners, and that the assignment was made to the partnership, yet this action is not one upon a partnership debt or account; that is to say, this action has not to do with partnership affairs. It is true that it is alleged that the assignment was made to the partners, but the facts showed, as found by the court, that Goodkind alone was the assignee. Under our statute, we are of the opinion that, as the facts were found, judgment was properly entered against Goodkind, for the account of Knatz, out of the proceeds of the assignment. Sections 239 and 240 of the Code of Civil Procedure are as follows:

“Sec. 239. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.

“Sec. 240. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.”

There was no demurrer to the complaint on account of misjoinder of parties. This question was passed upon in the case of *Conklin v. Fox*, 3 Mont. 208, in which the court says:

“Under the Code of Civil Procedure of this territory, ‘judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants.’ Section 231: ‘In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.’ (Code Civ. Proc. § 232.) We are satisfied that we may treat as immaterial the allegations of the complaint concerning the copartnership, and that a cause of action is stated against the defendants. ‘The proof showed that too many persons had been joined as defendants, but this fact does not appear upon the face of the complaint, and the answer of the appellant did not plead it. The appellant thereby waived his objection to the misjoinder of the parties defendant. ‘If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same.’ (Code Civ. Proc. § 86; *Parchen v. Peck*, 2 Mont. 567.) The action of the court in entering the judgment is sustained by the following authorities: Pom. Rem. §§ 289, 290; *Rowe v. Chandler*, 1 Cal. 168; *Rutenberg v. Main*, 47 Cal. 213; *Claflin v. Butterly*, 5 Duer 327. In *McIntosh v. Ensign*, 28 N. Y. 169, Mr. Justice Wright says: ‘A plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved, had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action against whom no liability is shown.’ The sections of the Code of Civil Procedure, *supra*, embody the principle which is maintained by these authorities. The allegations of the pleadings have been liberally construed, and substantial justice has been done between the parties. (Code Civ. Proc. § 98.)”

See, also, *Mining Co. v. Rumley*, 1 Mont. 201; *Wells v. Clarkson*, 5 Mont. 336; *Rowe v. Chandler*, 1 Cal. 168; See, also, *Lewis v. Clarkin*, 18 Cal. 389, where it is held that the common-law rule that, in a suit against several joint debtors, plaintiff must recover against all or none, is changed by the

statute which we have above quoted. See, also, *Tay v. Hawley*, 39 Cal. 93.

It is also contended that the judgment is erroneous in that the court allowed interest upon the account. Our statute provides that interest may be allowed "on money lent or money due on the settlement of accounts, from the day of such settlement of accounts, between the parties, and ascertaining the balance due." It appears from the complaint that on the 27th day of April, when the plaintiff, as a wage worker, demanded his money from the assignee, the defendant accepted the notice, and acknowledged the correctness of plaintiff's claim. We think this, under the statute above quoted, was a settlement of the account and the ascertaining of the balance due, and think, therefore, interest was properly allowed.

The judgment of the district court is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

MONTANA MILLING COMPANY, RESPONDENT, v. JEFFERIS, APPELLANT.

[Submitted September 16, 1896. Decided September 23, 1896.]

AGREED STATEMENT OF FACTS—Amendment.—Where the appellate court had reversed a judgment rendered for defendant in an action tried upon an agreed statement of facts, from which the amount and date of plaintiff's recovery had been omitted by inadvertance of counsel, the trial court may permit the statement to be amended by inserting the amount and date of plaintiff's recovery,—no proof or inquiry being necessary to ascertain them, and their insertion not changing the terms of the statement or the understanding of the parties.

Appeal from First Judicial District, Lewis and Clarke County.

PLAINTIFF'S motion for leave to amend the agreed statement of facts was granted by HUNT, J. Affirmed.

A. J. Craven, for Appellant.

E. C. Russel, for Respondent.

PEMBERTON, C. J.—This case was originally tried in the district court on an agreed statement of facts. Judgment was rendered in favor of the defendant, and the plaintiff appealed to this court. This judgment was reversed, and the cause remanded to the trial court, with instructions to render judgment in favor of the plaintiff for the amount of its demand. (*Montana Milling Co. v. Jefferis*, 14 Mont. 143.) By the terms of this agreed statement of facts, in the event of plaintiff's recovery, judgment was to be entered in its favor for the sum of \$127.34 and costs on September 22, 1890. But by inadvertance of counsel this amount, and the date, were omitted from said statement. After the case had been remanded to the trial court, as stated above, counsel for plaintiff asked leave of court to insert this amount and date in the statement of facts, in order that judgment might be rendered in accordance with the mandate of this court. Over the objection of the defendant, this leave was granted, and judgment rendered accordingly. From this action of the court the defendant appeals.

The defendant contends that the insertion of the amount and date mentioned above into the agreed statement of facts was an amendment thereof which the court had no power to make. But we think the statement was not amended in any manner repugnant thereto by this action of the court. The amount and date ought to have been inserted in the statement at the time it was prepared, and evidently were intended by the parties to have been incorporated into it, but by inadvertence they were omitted. It required no proof or inquiry to ascertain the amount and date. They were of record in the court, in a judgment therein obtained by plaintiff against other parties, and which judgment is referred to in said statement. There was no dispute at any time as to the amount or date. Their insertion into the statement did not change or alter its terms, or the agreement and understanding of the parties thereto. This action was not repugnant to the agreed statement, or any of its terms. (Comp. St. div. 1, § 280.) In fact, the trial court had to insert this amount and date in the statement in

order to comply with the mandate of this court. The appeal is entirely without merit. The judgment is affirmed.

Affirmed.

DE WITT, J., concurs.

HUNT, J., as a judge of the district court, having made the order appealed from, takes no part in the foregoing decision.

STATE, APPELLANT, v. CAIN, RESPONDENT.

16 561
16 564

[Submitted September 16, 1895. Decided September 23, 1895.]

CRIMINAL PRACTICE—Leave to file information—Revocation.—The district court may properly revoke its leave given to the county attorney to file an information against a county commissioner, charging him with extortion, where it appeared upon motion to set aside the information, that the grand jury had investigated the defendant's conduct, and, while finding that illegal payments had been made to him, found no indictment, and no showing was made by the county attorney either at the time of the filing of the information or at the time of defendant's motion, that the case was a proper one for further prosecution. (*State v. Brett, ante*, page 360, cited.)

Appeal from Third Judicial District, Granite County.

INFORMATION for extortion. Defendant's motion to set aside the information was granted by BRANTLEY, J. Affirmed.

W. L. Brown, D. M. Durfee and Smith & Word, for the State, Appellant.

Rogers & Rogers, for Respondent.

HUNT, J.—Upon the 7th of May, 1894, by leave of court first obtained, the county attorney of Granite county filed an information against the defendant, George B. Cain, a member of the board of county commissioners of Granite county, for corruptly and extorsively taking and receiving a warrant for \$110.40, part of which amount was a charge made by said Cain, as county commissioner, for inspecting and supervising the construction of a sewer about the county jail of Granite

county, for which services there was no authority of law to charge, and that the said charge was made with fraudulent intent.

On the 14th of May, 1894, the defendant moved to set aside the information, because, at the time the information was filed, and leave of court was asked by the county attorney, the county attorney had made no statement to the court of the evidence or reason upon which the same was based, and the court did not require the same of him, and was not informed at that time, in any manner or way, by any person, of the offense, or the facts upon which the county attorney had determined to present the said information. This motion was supported by the affidavit of W. B. Rodgers, one of the attorneys for the defendant. Rodgers' statement was to the effect that the county attorney, when he asked leave to file the information, made no statement to the court, and gave no information to the court which he may have had, and upon which he based the information, or his belief that the defendant was guilty of the offense charged; nor did the court inquire into the matter at all; nor was the court informed, in any manner, or at all, at the time of filing the information, of any facts which had come to the knowledge of the county attorney, or to the knowledge of anybody, and which had caused the county attorney to file the information against the defendant.

Affiant further stated that it appears by the report of the grand jury that at the March term of said court a grand jury had made an examination, as appears from their report, of the affairs of the county commissioners of Granite county, and into the conduct of the offices of the county commissioners during the year 1893, and that said grand jury failed to indict the said George B. Cain for any offense whatever.

It further appears by the record that, at the time the county attorney asked leave to file the information against the defendant, the report of the grand jury, which had been made in March preceding the time of filing the information, was on file with the clerk of the district court of Granite county. By this report the grand jury found that the defendant had illegally

been paid moneys for inspecting the jail and sewer. No indictment was presented. The excess of payment was the basis of the criminal charge contained in the information subsequently filed for extortion. The court sustained the motion to dismiss the information, and ordered the defendant discharged, and his bondsmen exonerated. The state duly excepted, and appeals from the decision and judgment.

This case is within the rule laid down in *State v. Brett*, ante, page 360, where it was held that, if an instance should arise where a county attorney oppressively, maliciously, or otherwise illegally should attempt to unjustly harass any citizen by filing an information against him charging him with crime, the court, either of its own motion, or upon proper showing, would suspend or deny its leave to file a charge until an inquiry could be had into the reasons for the official acts of the county attorney in filing the information, and until it satisfactorily appeared by the showing made that the case was one where an information should be filed.

The affidavit of W. B. Rodgers was sufficient to have warranted the court in refusing leave to permit an information to be filed against the defendant until some showing was made by the county attorney for charging the defendant with a crime based upon the identical acts into which a grand jury had inquired, but for the doing of which they had failed to find a true bill. The fact that the information was already on file when these facts were brought to the attention of the court cannot affect the right of the court to revoke the leave already granted. If the court, in the exercise of its sound judicial discretion, had a right to withhold its leave to file the information at all until inquiry could be had, under the limitations discussed in the Brett case, *supra*, it had a right to revoke its leave, where the defendant, directly after his arrest, and at the first opportunity presented, brought to the notice of the court the fact that his conduct had already been investigated by a grand jury, and no true bill had been found. Such was the effect of the defendant's motion. It brought to the attention of the court matters upon the presentation of which the

court, in its discretion, and for apparent good cause, suspended its approval to file the information, by revoking its former leave, and setting aside the subsequent proceedings. The record discloses no request thereafter by the county attorney to file another information, and no attempt on his part to demonstrate to the court that the case was a proper one for further prosecution.

The action of the district court being within its discretionary power, and without abuse thereof, the judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE, APPELLANT, v. MORSE, RESPONDENT.

[Submitted September 16, 1895. Decided September 23, 1895.]

See syllabus and opinion in *State v. Cain*, ante, page 561.

Appeal from Third Judicial District, Granite County.

INFORMATION for extortion. Defendant's motion to set aside the information was granted by BRANTLEY, J. Affirmed.

W. L. Brown, D. M. Durfee and Smith & Word, for Appellant.

Rogers & Rogers, for Respondent.

HUNT, J.—Information charging defendant, a county commissioner, with extorsively and corruptly receiving excessive fees from the county of Granite. The point herein raised is identical with that decided in *State v. Cain*, ante, page 561, and, upon the authority of that case, the judgment of the district court is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE, RESPONDENT, v. BYERS, APPELLANT.

[Submitted September 19, 1895. Decided September 23, 1895.]

CRIMINAL LAW—Larceny—Evidence—Statements of conspirators.—On a prosecution for grand larceny where others are indicted jointly with the appellant, evidence of acts and statements of the codefendants, made after the theft but before the sale of the stolen property, is admissible against the appellant as part of the *res gestae*.

SAME—Evidence—Stenographer's notes—Testimony of deceased witness.—A transcript of the stenographer's notes of the testimony which a witness, since deceased, gave at a preliminary examination, supported by the testimony of the stenographer as to its correctness, is admissible against the defendant on the trial of the case, where the defendant had cross-examined the witness at the preliminary examination. (*State v. Lee*, 13 Mont. 248, distinguished.)

Appeal from Third Judicial District, Deer Lodge County.

CONVICTION for grand larceny. The defendant was tried before BRANTLEY, J. Affirmed.

M. J. Cavanaugh and Francis Brooks, for Appellant.

It was error to admit testimony as to acts and declarations of Fred Byers or Jones or either of them, not done or made in the presence of appellant for the reason that at the time of the introduction of the testimony no *prima facie* case of conspiracy had been made out by the state. Such acts and declarations cannot be used to show the conspiracy without other independent evidence. (*Parker v. People*, 11 West Rep. 182; *Ford v. State*, 11 West Rep. 855.) It is necessary that defendant's guilt as principal or accessory, should be finally established by evidence of his own acts. (Wright on Crim. Con., 69-71; Rice on Evidence, Vol. 3, page 904, and cases cited.) Such acts and declarations were made after the consummation of the alleged larceny. (*Willy v. State*, 8 S. W. Rep. 570; *Armstead v. State*, 2 S. W. Rep. 627; *People v. Parker*, 11 W. Rep. 182.) They were not made or done during the pendency of the criminal enterprise, or in furtherance of the common design. (*State v. Melrose*, 98 Mo. 594; *State v. Hilderbrand*, 16 S. W. Rep. 948; *People v. Moore*, 45 Cal. 19; *Commissioners v. Ingraham*, 7 Gray 46; *State v. Pyke*, 51 N. H.

16	565
28	800
26	836
16	565
29	557
16	565
34	409

105; *Davis v. State*, 9 Tex. App. 363; *Avery v. State*, 10 Tex. App. 199.) The court also erred in permitting the state to read to the jury the testimony of John Young, a witness who had been examined on behalf of the state at the preliminary examination, but who had died between the said examination and the trial. (*State v. Lee*, 13 Mont. 248; *People v. Murphy*, 45 Cal. 137; *People v. Cunningham*, 4 Pac. 1144.)

J. H. Duffy, also for Appellant.

Henri J. Haskell, Attorney General, for the State, Respondent.

It is within the discretion of the trial court to allow the acts and declarations of one conspirator to be given in evidence against another conspirator before proof of the conspiracy has been given; subject to such proof being afterwards given. (1 Greenleaf on Evidence, § 111; *State v. Grant* (Iowa) 53 N. W. 120; *Spies v. People*, 122 Ill. 238; *Haines v. Territory*, (Wyo.) 13 Pac. 8.) If the whole of the evidence taken together at the trial shows the existence of a conspiracy, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations. (*Loggins v. State*, 12 Tex. App. 65; *State v. Winner*, 17 Kan. 298; Hayne on New Trial and Appeal, § 109, page 304; *Spies v. People*, 122 Ill. 1, 238; Wharton on Crim. Ev., 699; *State v. Flanders* (Mo.) 23 S. W. 1086; Rapalje on Larceny and Kindred Offenses, § 507.) The prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence or he may prove the acts of different persons and thus prove the conspiracy. (*Spies v. People*, 122 Ill. 1, 139; *State v. Peterson* (Kan.) 16 Pac. Rep. 263.) As the conspiracy extended not only to the stealing of cattle but to their slaughter and subsequent disposition, it therefore was not at an end until the cattle were disposed of. (*Scott v. State*, 30 Ala. 503.) It is well settled that the testimony of a deceased witness given in the presence of the de-

fendant at the preliminary examination or at a former trial of defendant may be proved at a subsequent trial, and that the defendant's constitutional right to meet the witnesses against him face to face, is not thereby infringed. (*Brown v. Com.* 73 Pa. St. 321; Wharton on Criminal Law, § 227; Rice on Criminal Law, Page 35, 3-5; *Mattox v. United States*, 156 U. S. 237, and cases cited; *Com v. Richards*, 18 Pick. 434; *Com. v. Cleary* (Pa.) 23 Atl. 1110; Greenleaf on Evidence, § 163; Cooley on Constitutional Limitation, 387.) *State v. Lee*, 13 Mont. 243, cited by counsel for appellant in their brief is not in point as in that case the witness, evidence of whose testimony at the preliminary examination was admitted at the trial, was alive but without the jurisdiction of the court. According to the weight of authority it is only when the witness is dead that his testimony given at a former trial or at the preliminary examination can be proved at a subsequent trial. (Rice on Criminal Evidence, page 354; *United States v. Arnold*, 11 Fed., cited in *State v. Lee*, *supra*.)

PEMBERTON, C. J.—The above-named defendant was convicted of the crime of grand larceny, in Deer Lodge county, under an information charging him and Fred Byers and John F. Jones jointly with the commission of that crime. The said parties were tried separately. From the judgment against him the defendant appeals.

Counsel for the appellant contend that the trial court erred in permitting witnesses to give evidence on the trial of the appellant as to the acts and statements of his codefendants, Fred Byers and Jones, after the consummation of the larceny, as they claim, and not in the presence of the appellant. It does not appear that the acts and statements of Fred Byers and Jones, testified to by the witnesses, took place and were made after the consummation of the offense. The prosecution contended that the three defendants entered into a conspiracy to steal the cattle that were stolen, butcher them, and sell the beef. This contention is not without support in the record. It appears that the acts and statements of Fred Byers and

Jones, testified to by the witnesses, took place and were made before the beef was sold in Butte by the appellant, and therefore before the consummation of the criminal conspiracy. And, besides, we are unable to find in the acts and statements of Fred Byers and Jones, testified to, anything to incriminate or injure the appellant. Fred Byers and Jones persistently stated and insisted that the appellant had nothing to do with the larceny of the cattle; that Fred Byers bought them, and that the appellant had no interest in them whatever. The statements objected to do not contain an admission or confession of guilt of the appellant or any one else. The acts and statements objected to were part of the *res gestæ*. The appellant's participation in the crime is shown by other evidence and circumstances than the acts and statements of Fred Byers and Jones.

At the preliminary examination of the appellant one John Young was a witness sworn and examined on the part of the state. The appellant was present, and cross-examined the witness. His evidence was taken down in full by the court stenographer, and afterwards transcribed and typewritten by him. Before the trial of this cause, the witness Young died. On the trial of the case the court permitted a transcribed copy of the stenographer's notes of Young's evidence, supported by his testimony that it was correct, to be read in evidence, over the objection of appellant. The admission of this evidence is assigned as error.

In *Mattox v. United States*. 156 U. S. 237,—a case involving precisely the same conditions as the case at bar,—Mr. Justice Brown, after an able and extended discussion of the subject, and collating the authorities, English and American, old and new, *pro* and *con*, says: "Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming. The question was carefully considered in its constitutional aspect by the supreme judicial court of Massachusetts in *Commonwealth v.*

Richards, 18 Pick. 434, in which it was said 'that provision was made to exclude any evidence by deposition which could be given orally in the presence of the accused, but was not intended to affect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law.' * * * The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that not the substance of his testimony only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said."

Counsel for appellant contend that this evidence was not admissible under the authority of *State v. Lee*, 13 Mont. 248. *State v. Lee* is widely distinguished from the case at bar. In the *Lee* case the witness whose testimony was proved was not dead; he was absent from the state. In that case the justice before whom the absent witness testified at the preliminary examination had no notes of the testimony, and testified only to an imperfect recollection of what the testimony of the absent witness was. Under such circumstances we held the evidence to be inadmissible. We are of opinion that the errors assigned in this case are not well taken, and that the judgment should be affirmed. It is so ordered.

Affirmed.

DE WITT and HUNT, JJ., concur.

STATE EX REL. CITY OF BUTTE, APPELLANT, v. JOHNSON, COUNTY CLERK, RESPONDENT.

[Submitted September 23, 1895. Decided September 26, 1895.]

TAXATION—Assessment.—An assessment is completed when the persons and property to be taxed have been listed and the sums which are to constitute the basis of an apportionment have been estimated.

SAME—Completion of assessment by city.—Under a statute (Political Code, §§ 4572, 4582) requiring city councils, on the second Monday in August of each year, to determine by resolution the amount of city taxes to be levied and assessed by the city for the current year, and making the county assessment the basis of taxation, the assessment of property in a city is not completed until the date of the resolution of the city council fixing and levying the amount of taxes to be levied and assessed for such year.

SAME—Extending city taxes on tax list.—Where the assessment of property in a city was not completed until the second Monday of August, 1895, the assessment is not within § 4017 of the Political Code (adopted July 1, 1895,) providing that all taxes assessed before that code took effect must be collected under the laws in force at the time the assessment was made, and therefore it is the duty of the city treasurer, and not of the county clerk, to extend the city taxes on the county tax list, as provided by §§ 4567, 4568, 4572 of the Political Code.

Appeal from Second Judicial District, Silver Bow County.

APPLICATION for writ of mandate to compel the defendant as county clerk to extend the taxes of the city of Butte for the year 1895 on the county tax list. Judgment was rendered for the respondent below by SPEER, J. Affirmed.

L. J. Hamilton, for Appellant.

Henri J. Haskell, Attorney General, for Respondent.

PEMBERTON, C. J.—This is an application for a writ of mandamus. Omitting the formal parts, the application for the writ, in substance, alleges that the city council of the city of Butte, as empowered by law, on the 12th day of August, 1895, duly determined by resolution the amount of city taxes to be levied and assessed for all purposes for the current year 1895 on the taxable property in said city; that the clerk of said city at once certified to said respondent, as county clerk, the amount of city taxes, for all purposes, so determined by said city council; that by said resolution the city council fixed

and determined the amount of city taxes, for all purposes, to be assessed and levied upon the taxable property in said city of the year 1895; that said respondent, as such county clerk, failed and refused to extend the city taxes on the tax list of said county for said year, as it was his duty to do; that said respondent claims that it is not his duty, as county clerk, to extend said city taxes for said year on the county tax list, but that, under the law, it is the duty of the city clerk to certify the amount of city taxes fixed and levied by said council to the city treasurer, and that it is the duty of the city treasurer, under the law, to extend said city tax roll on the tax book for said year.

The respondent, on being served with the alternative writ of mandamus issued in the case, demurred to the application. The court sustained the demurrer, dismissed the application, and rendered judgment against the relator for costs. From this action and judgment the relator appeals.

The question presented by this appeal is this: Is it the duty of the city treasurer of the city of Butte, or of the respondent, as clerk of the county of Silver Bow, to extend the taxes of said city for said year on the tax list or book?

Section 4017, Political Code, provides: "All taxes assessed before the provisions of this title take effect must be collected under the laws in force at the time the assessment was made, and in the same manner as if this Code had not been passed."

Section 4872, Id., reads as follows: "The council must, on the second Monday in August in each year, by resolution determine the amount of city or town taxes for all purposes, to be levied and assessed on the taxable property in the town or city, for the current year, and the city clerk must at once certify to the city treasurer a copy of such resolution, and the city treasurer must collect the taxes as in this article provided."

Section 4862, Id., makes the assessment by the county assessor for county purposes the basis of taxation for cities and towns.

The first question that presents itself is, when was the prop-

erty in the city of Butte assessed? That is, when was the assessment completed? As to when an assessment is made, Judge Cooley, in his work on Taxation, at pages 351, 352 (2d Ed.), says: "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not, therefore, of itself, lay the charge upon either person or property, but it is a step preliminary thereto, and which is essential to the apportionment. As the word is more commonly employed, an assessment consists in the two processes of *listing* the persons, property, etc., to be taxed, and of *estimating* the sums which are to be the guide in an apportionment of the tax between them. When this listing and estimate are completed in such form as the law may have prescribed, nothing remains to be done, in order to determine the individual liability, but the mere arithmetical process of dividing the sum to be raised among the several subjects of taxation, in proportion to the amounts which they are respectively assessed." See 1 Desty on Taxation, § 93, to the same effect.

Under this view of the law, the assessment was not made or completed until the 12th day of August, 1895,—the date of the resolution of the city council fixing and levying the amount of taxes to be levied and assessed for said year. If the assessment was not made until the date of the resolution of the city council, then, under section 4872, *supra*, it became and was the duty of the city clerk to certify the action and resolution of the city council to the city treasurer, whose duty it then became to collect the city taxes. No section of the law to which our attention has been called requires the city clerk to certify the resolution of the city council fixing, assessing and levying city taxes to the county clerk. It is the duty of the county clerk, on or before the first Monday in October, to make a duplicate of the Corrected Assessment Book for each town or city in the county, which must contain a copy of the Corrected Assessment Book for such town or city. Such duplicate book must be made in a book furnished by the city

or town clerk of each city or town in the county, and ruled in columns, specifying the different funds, so that the city or town treasurer may extend the same, and collect the taxes. Sections 4867, 4868, Political Code. These sections seem conclusive that it is the duty of the city treasurer, and not the county clerk, to extend the city taxes on the tax list or book.

Upon the question of extending the tax, Judge Cooley says: "The subjects of taxation having been properly listed, and a basis for apportionment established, nothing will remain to fix a definite liability, but to extend upon the list or roll the several proportionate amounts, as a charge against the several taxables. When that is done, but not until then, will a liability for any particular sum be fixed. When the sum to be raised is settled, and the assessment is completed, the calculation of the percentage of the tax, and the determination of the sum chargeable to each taxable, are clerical acts, and may be performed by any one." (Cooley on Taxation (2d Ed.), page 423.)

The law provides that taxes levied for each year shall be liens upon the property taxed, and shall take effect as of the first Monday of March of each year. (Political Code, §§ 3827-3829.) This character of legislation is in force in many of the states of the union. Judge Cooley says: "The time when the lien will attach to land must be determined by the terms of the statute. Sometimes the statute names a day as that from and after which the tax shall be a lien, and when that is done it may determine, as between subsequent purchasers and incumbrances, the liability for the tax." (Cooley on Taxation (2d Ed.), page 447, and authorities cited in note.) But the question as to when taxes become a lien upon property is unimportant in the discussion of the questions involved in this appeal. The only question presented for our determination now is as to whose duty it is to extend the city taxes of the city of Butte on the tax book for the year 1895.

From a consideration of the law and the authorities referred to above, we are of opinion that it is the duty of the city treasurer of the city of Butte. The judgment of the court is therefore affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

STATE, RESPONDENT, v. WHALEY, APPELLANT.

[Submitted September 17, 1895. Decided September 30, 1895.]

APPEAL—New trial—Notice—Specification of errors.—Appeals are matters of statutory regulation, with which there must be a substantial compliance in order to confer jurisdiction, and therefore, a notice of intention to move for a new trial which fails to specify the particular errors relied upon as required by section 355, Third Division of the Compiled Statutes, is insufficient, and a written motion for new trial, specifying the errors relied upon, served and filed contemporaneously with the notice, cannot be construed as a notice of intention to move, so as to cure the defect. (*State v. Fry*, 10 Mont. 407; *Courtright v. Perkins*, 2 Mont. 404; *Territory v. Hanna*, 5 Mont. 247; *State v. Gibbs*, 10 Mont. 210; *State v. Northrup*, 13 Mont. 584, cited.)

NEW TRIAL—Notice—Stipulation.—The absence of a proper notice of intention to move for a new trial is not cured by a stipulation to the effect that the bill of exceptions and papers considered by the court and used on motion for a new trial, be settled, allowed and considered as a bill of exceptions on appeal.

SAME—Notice—Waiver.—Failure of a notice of intention to move for a new trial to specify the particular errors relied upon is not waived by a motion to strike it out upon other grounds. (*Gregg v. Garrett*, 13 Mont. 13, cited.)

SAME—Order denying—Review on appeal.—While an order denying a new trial is an intermediate order or decision within section 394, Third Division of the Compiled Statutes, so as to entitle it to be reviewed on an appeal from the judgment, the errors enumerated in section 354, Id., as grounds for a new trial must be first called to the attention of the district court on motion for new trial in order that the trial court may have an opportunity to correct its own errors.

SAME—Review on appeal—Change of venue—Challenge to jurors.—Under section 354, Third Division of the Compiled Statutes, providing that a new trial may be granted when there has been any abuse of discretion, alleged errors in denying a change of venue and in overruling challenges to jurors will not be reviewed by the appellate court without a motion for a new trial having been made.

Appeal from Fourth Judicial District, Ravalli County.

CONVICTION for grand larceny. The cause was tried before **WOODY, J.** Affirmed.

Marshall & Corbett, Webster & Wood and Toole & Wallace,
for Appellant.

Henri J. Haskell, Attorney General, for the State, Respondent.

DE WITT, J.—This is an appeal from a judgment convicting the defendant of the crime of grand larceny. A notice of motion for new trial was served February 10, 1894, and filed February 12, 1894. Another notice of intention to move for new trial was served June 1, 1894, and filed on the same day.

Neither of these notices of intention stated particularly the errors upon which the party making the application relied. (Criminal Practice Act, 1887, § 356; *State v. Black*, 15 Mont. 143; *State v. Fry*, 10 Mont. 407.) It is conceded by the appellant's counsel that these notices do not contain such particular specification. Contemporaneously with filing the second notice of intention to move for a new trial, the defendant served and filed a written motion for new trial.

While it is conceded by counsel that the notices of motion are insufficient in not specifying the particulars, they contend with great earnestness that the motion for new trial should be construed to be a notice of intention to move. But it is perfectly apparent to us, from the record, that this motion was not intended to be a notice of motion, for the sufficient reason that a notice of motion was filed at the same time that the motion was. It certainly never was the intention of counsel to consider their motion as a notice, when in fact they filed an independent notice upon the very same day. We cannot distinguish this case from that of *State v. Fry*, *supra*. In the last-named case the defendant gave a notice of intention, without specifying the particular errors, but stating that the motion was to be made upon the grounds to be set forth in the motion. Afterwards the defendant served and filed his motion for new trial, which specified every error that was relied upon by him. The motion was denied by the district court on the ground that no notice had been served. (Page 408 of the opinion.) After citing the statute (§§ 355, 356, Criminal Practice Act), the supreme court, in the Fry case, said: "The statutes have designated the acts which are essential to the notice of the intention to move for a new trial. The court in *Burton v. Todd*, 68 Cal. 485, has said: 'We conclude, therefore, (1) that, as the right to move for a new trial is statutory, it must be pursued in the manner pointed out by the statute.' The appellant could not lawfully embody in his motion for a new trial the particulars which should be stated in his notice of intention. The appellant has not filed or served a proper notice of his intention to move for a new trial, and the judg-

ment is affirmed, and will be executed as directed in the court below." It has often been said in other decisions in this court that appeals are matters of statutory regulation, and that there must be a substantial compliance with the statute in order to confer jurisdiction upon this court. (*Courtright v. Berkins*, 2 Mont. 404; *Territory v. Hanna*, 5 Mont. 247; *State v. Gibbs*, 10 Mont. 210; *State v. Northrup*, 13 Mont. 534.)

While the facts in the case of *State v. Black* are not wholly the same as in the case at bar, and while *State v. Fry*, above cited, is more direct authority on the matter now before us, still the following remarks from the *Black* case are of general application. In that case we said: "We can see only two courses for this court to pursue in this case,—either to follow the statute, and disregard the defendant's objection, now made in his argument for the first time, that the instruction as to *alibi* was error, or to disregard the statute, and establish a rule of practice in contravention thereto. But, as quoted from a decision in the learned brief of defendant's counsel, '*Judex est custos non conditor juris, judicia exercere potuit, facere leges non potest.*' And in the case at bar the law is as we have quoted it from the statute; and if we are the custodians, and not the framers, of the law, there is no course before us but to follow the mandate of the statute, and to hold that the alleged objectionable instruction is not now a subject for review." We cannot do otherwise than follow the authority of the *Fry* case, and hold that the foundation for a motion for a new trial was not laid, owing to the fact that a proper notice of intention was not served and filed.

It is contended that there is a stipulation made between counsel which cures the absence of a proper notice of intention. We are of opinion that the stipulation does not aid the appellant, for the reason that it is simply to the effect that the bill of exceptions and papers considered by the court and used on motion for new trial be settled, allowed, and considered as a bill of exceptions on appeal. Whatever effect this stipulation may have, it cannot be greater than to simply present to

this court what the district court acted upon, and cannot in any way be considered as a waiver of the absence of a notice of intention to move.

Again, it is contended that the state's attorney waived the notice of intention to move, as to some parts of the same, for the reason that he appeared and moved to strike out the notice and motion on certain grounds. It is contended by appellant that the motion to strike out was directed at the notice of intention only as to the first four subdivisions of section 354, Criminal Practice Act, 1887, and was not directed at the three last grounds mentioned in said section. We are of opinion that this action by the state's attorney was not a waiver of the absence of a sufficient notice.

As said in *Gregg v. Garrett*, 13 Mont. 13: "The defect taken advantage of is apparent in the notice itself, and requires no other matter inserted in the record to show this fact. This irregularity in presenting the motion, without stipulation or other action amounting to a waiver of proper notice, may have been the very ground upon which the trial court denied the motion. (*White v. Superior Court*, 72 Cal. 475, 14 Pac. 87; *Hayne*, New Trial & App. §§ 14, 145.) And we think, in the absence of anything in the record showing a waiver, the objection by respondent should be sustained."

It has been held, on settlement of statements on motion for new trial or bills of exceptions, that when a party comes in, and by amendment or otherwise assists in making up the record, that he thereby waives certain defects, unless he objects to the same, and makes his objection part of the record. (*Sweeney v. Great Falls & C. R. Co.*, 11 Mont. 31.) But in the matter before us, as above noted, the defect in the notice is perfectly apparent on the face of it. The notice of intention informed neither the counsel nor the court of the particular errors relied upon.

Counsel further contends that, if this court concludes that it will not examine the motion for new trial, still there were errors upon the trial which may be reviewed at this time without any motion for new trial made. He cites us to sections

394 and 404 of the Criminal Practice Act of 1887, which are as follows:

"Sec. 394. An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and, upon appeal, any decision of the court, or intermediate order, made in the progress of the case, may be reviewed."

"Sec. 404. The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary, or proper, order a new trial. In either case the cause must be remanded to the court below, with proper instructions and the opinion of the court, within the time, and in the manner, to be prescribed by rule of court."

It is true that, on appeal from the judgment, the supreme court, in reviewing an intermediate order or decision, has always held that an order denying a new trial was such an order, and the same was reviewed on appeal from the judgment. But we are of opinion that it is the intention of the Criminal Practice Act (1887) that the errors enumerated in section 354 shall be called to the attention of the district court on motion for new trial, and that that court shall thereby first have an opportunity to correct its own errors.

Appellant's counsel now claim that we should review the alleged error of the district court in denying the motion for change of venue, and the alleged error in overruling challenges to jurors. But these are matters which we think the district court should review on motion for new trial. It has long, if not always, been the practice in this state and territory that such errors were so reviewed first by the district court, and that they were then brought to the supreme court on appeal from the judgment, and thereby was had a review of the order denying the new trial.

The sixth subdivision of section 354 provides that a new trial may be granted "when the court has either admitted illegal, or excluded legal, evidence; or there has been any abuse of discretion by which the party was prevented from having a fair trial." A party is prevented from having a fair trial if

the district court abuses its discretion in denying him a change of venue on the ground of the existence of undue influence of the prosecutors, or prejudice of the inhabitants of the county against the defendants.

These questions which the district court passed upon in denying the motion for change of venue were purely questions of fact. The court passed upon these questions as they were raised by affidavits. Its decision was a matter of discretion. If it were abused, it could be reviewed on motion for new trial.

We are of opinion that the same principle obtains in reviewing the action of the court in overruling challenges to jurors in this case. The challenges were interposed on the ground of the jurors having formed and expressed opinions upon the guilt or innocence of the defendant. These were questions of fact, to be determined by the district court upon examination. The court was the trier of this question of fact. (Criminal Practice Act 1887, § 288.) If the court erred in determining these questions of fact, it was an abuse of discretion, which could be reviewed on a motion for a new trial, under subdivision 6 of section 354.

As this record is before us, we are constrained to affirm the judgment. It is one of the cases which is affirmed with reluctance, for the reason that we are of opinion that there were errors upon the trial of the case which prevented the defendant from having a fair trial, and which should have been properly presented to us for review. We dislike to animadvert upon the preparation of appeals by counsel, but the fact is that this record, and the method of proceeding to bring this case before this court, is subject to the gravest criticism. If errors occur in the trial of a criminal case, involving the liberty of a citizen, as long as the statute gives him the right of appeal by conforming to its provisions it is a great misfortune that such a defendant should be deprived of a hearing by reason of neglect to properly present his case. These are matters, however, which we can regret, but not remedy. The defendant's only recourse now is to another department of the

government, to which department we commend a consideration of the case.

The appeal must be dismissed which is an affirmance of the judgment, (*State v. Biesman*, 12 Mont. 11), and the same is accordingly affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE, RESPONDENT, v. WHALEY, APPELLANT.

[Submitted September 17, 1895. Decided September 30, 1895.]

See syllabus and opinion in *State v. Whaley*, ante, page 574.

Appeal from Fourth Judicial District, Ravalli County.

CONVICTION for grand larceny. The defendant Clement P. Whaley was tried before WOODY, J. Affirmed.

Marshall & Corbett, Webster & Wood and Toole & Wallace.
for Appellant.

Henri J. Haskell, Attorney General, for the State, Respondent.

PER CURIAM.—This is an appeal by the defendant from a judgment convicting him of the crime of grand larceny.

As stated by appellant's counsel, precisely the same questions of procedure are involved in this case as in the case of *State v. Daniel J. Whaley*, ante, page 574. Therefore, on the authority of the last mentioned case, the judgment of the district court is affirmed.

Affirmed.

STATE, RESPONDENT, v. WHALEY, APPELLANT.

[Submitted September 17, 1896. Decided September 30, 1896.]

See syllabus and opinion in *State v. Whaley*, ante, page 574.

Appeal from Fourth Judicial District, Ravalli County.

CONVICTION for grand larceny. The defendant Matthew L. Whaley was tried before WOODY, J. Affirmed.

Marshall & Corbett, Webster & Wood and Toole & Wallace,
for Appellant.

Henri J. Haskell, Attorney General, for the State, Respondent.

PER CURIAM.—This is an appeal by the defendant from a judgment convicting him of the crime of grand larceny.

As stated by appellant's counsel, precisely the same questions of procedure are involved in this case as in the case of *State v. Daniel J. Whaley*, ante, page 574. Therefore, on the authority of the last-mentioned case, the judgment of the district court is affirmed.

Affirmed.

BLAINE ADMINISTRATRIX, ET AL., RESPONDENTS, v. BRISCOE ET AL., APPELLANTS.

[Submitted September 25, 1895. Decided September 30, 1895.]

JUDGMENTS—Default—Vacating—Unauthorized appearance.—The refusal of the district court to open a default was not an abuse of discretion where it appeared, that while appellant was not served with summons and her son-in-law and agent who had employed counsel to represent her, made affidavit that he had done so without her knowledge and consent, she had sought both in the trial court and on appeal, to take advantage of whatever benefit might accrue from the filing of a demurrer by her counsel while at the same time repudiating his authority to represent her, and it did not appear when she first had knowledge of such unauthorized appearance or of the default.

CONTEMPT—Unauthorized employment of counsel.—Where one, without authority, employs counsel to represent a party to an action, *semble* that such conduct may constitute contempt under subdivision 9 of section 584, First Division of the Compiled Statutes, punishing as for a contempt "any unlawful interference with the process or proceedings of a court."

Appeal from First Judicial District, Lewis and Clarke County.

THE demurrer and motion to vacate the default of the defendant Coyle were overruled by BUCK, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an appeal from a judgment rendered upon the overruling of defendants' demurrer to the complaint, and also an appeal from a special order made after judgment denying the motion of defendant Sarah J. Coyle to set aside the judgment in the case. The complaint was filed October 10, 1893. A demurrer on the part of all the defendants was filed by Messrs. Word & Smith, attorneys at law, on October 16, 1893. The demurrer was overruled October 19, 1893. On November 20th the default of John O. Briscoe and Sarah J. Coyle was entered. On the 23d of November, judgment was entered in favor of plaintiffs, and against the defendants.

W. J. Anson, for Appellant.

Toole & Wallace, for Respondent.

DE WITT, J.—On the appeal from the judgment, the only matter now for consideration is whether the demurrer to that

pleading was properly sustained. Nothing appears to indicate that there was any defect in the complaint by reason of which the demurrer should have been sustained. The judgment must therefore be affirmed.

The point upon which the defendant Sarah J. Coyle or her administrator now relies is the alleged abuse of discretion by the district court in denying her motion to set aside the default. The motion was made upon the ground that she was never served with summons, and that the appearance for her by Messrs. Word & Smith, attorneys at law, was unauthorized. It is true that she was not served with summons. But, if she appeared by counsel, that was equivalent to service of summons. (Code of Civil Procedure 1887, § 80.) As against this proposition, Mrs. Coyle's counsel contend that she never authorized Messrs. Word & Smith to appear for her. The facts, as they appeared upon the hearing of the motion, were as follows: John O. Briscoe, one of the defendants, was the son-in-law of the defendant Mrs. Coyle. Briscoe had formerly owned the real estate in dispute, and had conveyed the same to his mother-in-law. He was Mrs. Coyle's managing agent in renting and caring for the property. Upon the service of summons upon Briscoe, he retained Messrs. Word & Smith in the case, informing them that he had authority to employ counsel to appear for the defendant Mrs. Coyle. Upon this information and request from Briscoe, Mr. Robert B. Smith, of that law firm, filed a demurrer for all the defendants. As noted in the statement of the case above, this demurrer being overruled, all of the defendants defaulted for want of an answer, and judgment was entered. On the motion to open the default and set aside the judgment, Mrs. Coyle filed her affidavit, in which she stated that she did not know Messrs. Word & Smith, and that she never authorized them to appear for her. Upon the motion there was also filed the affidavit of John O. Briscoe. That affidavit is as follows:

“State of Montana, County of Lewis and Clarke.—ss.

“J. O. Briscoe, being duly sworn, deposes and says that he is the agent of Sarah Coyle, one of the defendants in the above

entitled action, for the purpose of renting and collecting rents of the property in dispute by and between these plaintiffs and defendants herein; and this affiant further deposes and says that he voluntarily and without the knowledge, consent or approval of the said Sarah Coyle to employ counsel to represent her in the said case, that he did authorize Messrs. Smith & Word to appear and represent her interest in this entitled action."

"[Duly verified.]"

"J. O. Briscoe."

There were a great many other affidavits filed on the motion, which do not seem to us to be of great importance. Upon the showing made, the district court refused to open the default. The defendant Mrs. Coyle appealed. Since the filing of the record, Mrs. Coyle has died. W. E. Higgins, her administrator, has been substituted in her stead.

Granting and denying motions to open defaults are matters within the sound discretion of the district court. Upon the bare showing made by the affidavits, it might appear, perhaps, that there was ground for the district court to set aside this default, and allow Mrs. Coyle to file an answer. But there are other circumstances in this case which addressed themselves to the discretion of the district court. It is significant to observe that Mrs. Coyle, in the district court and in her brief in this court, seeks to take every advantage which might accrue to her by virtue of the filing of the demurrer by Mr. Smith.

She even comes here and argues that the demurrer should have been sustained. She puts herself in the inconsistent position of seeking the benefit of Mr. Smith's legal services, and at the same time of repudiating his authority to appear for her. Again, it is to be noted that Mrs. Coyle's default was entered November 20th. She moved to set it aside on January 3d. She studiously avoided to state in her affidavit when she obtained information that Mr. Smith had appeared for her, or that her default was entered. For all that appears, she may have been fully aware of the appearance of these attorneys from the very day when they filed their demurrer, which was October 16th. Her omission to state when she obtained this

information is extremely significant. In moving to set aside a default, one must be prompt, and not dilatory. If Mrs. Coyle were surprised at finding this judgment entered against her, if she were surprised that Messrs. Smith & Word appeared for her, she should, in fairness to the district court, have stated when she obtained this information. Her silence in this respect leaves her open to the well founded suspicion that she was playing for any advantage by Mr. Smith's appearance, and for a repudiation of such appearance when it suited her convenience. Furthermore, we have the fact of Mrs. Coyle's being a family connection of defendant Briscoe, and the further statement of some of the affidavits that it was understood that, when Mrs. Coyle was in this state, she resided in the family of said Briscoe. Under all of these circumstances, and owing to the further fact that, if any injustice had been done Mrs. Coyle, she has a remedy in an action in equity, we are of opinion that the district court did not abuse its discretion in declining to open the default. The judgment and the order are affirmed.

In remitting this case to the district court, we call the attention of the district judge to the remarkable affidavit of J. O. Briscoe, which has been quoted in this opinion above. It is provided in section 584 of the Code of Civil Procedure (1887) as follows: "The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * * Ninth. Any other unlawful interference with the process or proceedings of a court. * * *"

Whether the conduct of Briscoe, as disclosed by the record, is a contempt, is a question which has not been investigated or argued before us. It would seem that such conduct was an unlawful interference with the proceedings of the district court. Briscoe employed Mr. Smith to appear for Mrs. Coyle. This is not denied. Then he boldly states that he did this voluntarily, and without the knowledge, consent or approval of Mrs. Coyle.

The district court is advised to institute proper proceedings

for the determination of whether said Briscoe was guilty of contempt of court, and, upon such inquiry to deal with him as seems proper and just under the law and the facts. Remittitur forthwith. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

RULES .

OF THE

SUPREME COURT

OF THE

STATE OF MONTANA.

IN FORCE JANUARY 1, 1896.

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RULES.

I.

RECORD OF OFFICIAL COMMISSIONS.

The commissions and oaths of the justices and clerk of this court, and the attorney general, shall be recorded in the records of this court.

II.

ORIGINAL PROCEEDINGS.

Proceedings commenced in this court originally to obtain writs of habeas corpus, injunction, review, mandate, quo warranto, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the code of civil procedure for the conduct of such proceedings in the district court

The application for the issuance of any of the above writs or orders, except habeas corpus, must set forth, in addition to the other requisite matters, the reasons which render it necessary that the writ should issue originally from this court, and the sufficiency or insufficiency of the reasons so set forth will be determined by the court in awarding or refusing the writ or order.

III.

APPEALS IN CRIMINAL CASES.

1. **TIME AND MANNER.**—Appeals in criminal cases shall be taken within the time and in the manner prescribed in the penal code.

2. **RECORD ON APPEAL.**—The record on appeal must be either printed or typewritten, on paper of such uniform size and

quality, and having so much margin, and bound in such manner, as will be designated by the clerk of the court on application. The parts of the record shall be chronologically arranged and indexed alphabetically.

3. APPLICATIONS FOR CERTIFICATE OF PROBABLE CAUSE.—Application for the certificate of probable cause of appeal provided for in section 2278, penal code, may be made to a justice of this court only after application and refusal thereof by the judge of the court in which the conviction was had, or upon proof of his absence, or inability to act, and upon at least three days' notice to the county attorney. The applicants shall produce at the hearing the proposed record on appeal, or the settled bill of exceptions, or certified copies thereof.

IV.

APPEALS IN CIVIL CASES.

1. RECORD ON APPEAL.—Appellant is charged with the duty of having the transcript perfected and filed with the clerk of this court, in accordance with the statute and these rules.

2. TIME OF FILING.—The record on appeal shall be filed by the appellant with the clerk of this court within sixty days after such appeal is perfected, and the bill of exceptions or statement, if any to be used therein, is settled, otherwise the appeal is subject to dismissal.

3. TIME EXTENDED IF DELAY IS WITHOUT APPELLANT'S LACHES.—If it appears that appellant filed his *præcipe* with the clerk of the trial court in reasonable time, directing the preparation of the transcript, specifying the proper matter to be included therein, and the same was not prepared in time for filing in the appellate court, as required by these rules, and such delay has been without laches on the part of appellant, his appeal will not be dismissed for such delay until reasonable time is allowed for filing the record.

4. DISMISSAL FOR LACHES.—But if it appear that the *præcipe* requiring the preparation of the transcript was not filed in time to allow the clerk of the trial court reasonable

opportunity to prepare the same for filing in this court, according to the requirements of these rules; or if material and necessary parts of the record are not called for by the *præcipe*, and no satisfactory excuse for such omission appears, the appeal may, in the discretion of the court, be dismissed for such delinquency.

5. **MOTION TO DISMISS FOR LACHES.**—Motion to dismiss an appeal for failure to file the record within the time required, shall be accompanied by a certified copy of the notice of appeal, and *præcipe*, if one were filed; and a certificate of the clerk of the trial court, showing whether the case was originally instituted in the district court, or was there on appeal from an inferior court, and the nature, amount and date of judgment or order appealed from; the date of filing notice and undertaking on appeal; the date of service of such notice, and showing whether appellant has requested or received a duly certified transcript, and the time of such request, or delivery thereof, as the case may be. No appeal shall be dismissed for failure to file the record within the time required by these rules, unless the motion to dismiss shall have been filed, and notice thereof given, prior to the filing of the record.

6. **SUGGESTION OF DIMINUTION.**—Nor shall the appeal be dismissed because the transcript is imperfect, in not being prepared as directed by the *præcipe*; but this court will, on suggestion of diminution, order the clerk of the trial court to correct the transcript, or supply the portions lacking, as the case may require.

Respondent may likewise make suggestion of diminution of record in any respect he may deem necessary; whereupon, if the suggestion appears to be proper, an order will be made requiring such parts of the record suggested to be certified to this court.

7. **CORRECTION OF ERROR IN RECORD.**—Either party may, in writing, suggest error or defect, wherein the transcript does not conform to the original, and, upon notice to the adverse party, obtain an order of this court requiring the clerk of the trial court having in custody the original record, to either

compare and correct the transcript on file in this court, or certify a supplemental transcript of such parts of the record as may be thus questioned. If such error or defect be disputed by the adverse party the suggestion must be verified in the manner required by law for verification of pleadings.

8. Transcripts must be fastened at the side and bound in pasteboard covers. Pages of transcript must not exceed thirteen inches in length by eight inches in width. Manifold copies will not be allowed.

9. ARRANGEMENT AND INDEX.—The record on appeal shall be chronologically arranged, and contain an index, showing the page of each pleading, document, exhibit, order and proceeding, and the testimony or affidavit of each witness comprised therein.

10. TESTIMONY TO BE IN NARRATIVE FORM.—The testimony shall be reduced to narrative form, and if not so reduced may be stricken out.

11. IDENTIFICATION OF MATTER REFERRED TO IN EXCEPTIONS OR MOTIONS.—Where an exception refers to matter in pleadings, evidence or other proceedings, which the court struck out, or refused to strike out, on motion, such exception or motion must either recite the matter in question or be made to refer to the same matter by page and line, as it appears in the transcript.

12. FORMAL PARTS OF PAPERS OMITTED.—Unless some question is predicated upon the formal parts of pleadings, motions, depositions, exhibits or other papers filed in the trial court, and made part of the record on appeal, the same should be omitted in preparing the record, after once stating the venue and title, giving the names of the parties in full, and thereafter the venue and title may be indicated by the words "title of cause." And likewise—

a. Formal parts of depositions, *i. e.*, notices, interrogatories, certificates of officers taking the same, signatures of witnesses, etc., may be omitted, the substance of the testimony contained in the depositions being reduced to narrative form,

subject to amendment and settlement by the trial judge, as in the case of other testimony.

b. So with deeds, mortgages, contracts, and other exhibits, the endorsement thereon of certificates of acknowledgment and recording may be omitted, and only the material part stated.

c. All endorsements made by officers may be omitted in preparing the record, except the date of the filing of papers in the trial court, which ought to appear in the record by simply noting "filed———," giving the date of filing.

13. INCORPORATION OF AN ORIGINAL EXHIBIT IN THE RECORD.—Whenever in the trial of an action or other proceeding, finally appealed to this court, an exhibit of a printed book or pamphlet, or other printed or engraved matter, or of a model, drawing, map, trade mark, plans or illustrations, or other matter formed, drawn, printed or engraved, is introduced or offered in evidence, and it is desired by either party to use the same original exhibit as part of a statement on motion for new trial, or of the case on appeal, or in a bill of exceptions, such exhibit, authenticated by a certificate of the judge of the trial court thereon or attached thereto, may be brought to this court in its original form as introduced in evidence, either bound in the transcript of the record on appeal, if convenient so to do, or as an exhibit accompanying such record to this court properly authenticated and certified. Any such exhibit bound in the record filed in this court shall not be withdrawn; but any such exhibit not bound in the record may be withdrawn after determination of the case by order of the court or any Justice thereof.

Whenever the record contains a transcript of any document, writing, map, drawing, engraving, or printed matter, which was introduced in evidence, in a case brought to this court on appeal, and it is deemed expedient to have the same here for examination in the original form, an order will be made requiring the officer or party having the same in custody to place such original exhibit in the custody of the clerk of this court. Any such exhibit may be withdrawn by the party en-

titled to the custody thereof, after determination of the appeal, by application to the clerk of this court.

14. **PROOF OF EXCEPTION WHERE TRIAL COURT REFUSED TO ALLOW THE SAME.**—In case any Judge of the district court fail or refuse, upon proper presentation or request, to allow, settle and certify an exception, or statement of the case, in accordance with the facts and the law and practice in such cases, the party aggrieved may, within twenty days thereafter, present to this court, or any two Justices thereof, a petition verified by the oath of the party aggrieved, or his attorney, setting forth the facts in relation to such failure or refusal; and thereupon this court, or such Justices thereof, will, if sufficient grounds appear therefor, issue an order granting leave to the petitioner, to prove before a referee to be named in such order, or by depositions, to be taken in the manner prescribed by statute, the facts in relation to such exception, or bill of exceptions, or statement of the case, and the failure or refusal to allow, certify or settle the same.

A copy of such order shall be served on the adverse party to the action or proceeding, wherein such failure or refusal is alleged to have occurred, or his attorney, together with the notice of the time and place of taking such testimony.

V.

BRIEFS.

1. **SIZE.**—Briefs shall be of uniform size, printed upon octavo pages, printed matter to cover space four by six inches, on pages not to exceed six and one-quarter inches by nine and one-half inches in size, on white writing paper.

2. **TIME OF FILING AND SERVICE.**—The counsel of appellant shall file with the clerk of this court seven copies, and serve on opposite counsel one copy of a printed brief, at least thirty days before the day upon which the case is to be argued, except in cases advanced on calendar, in which cases briefs shall be filed and served by appellant within five days after the order of advancement.

3. **CONTENTS OF BRIEF.**—The brief shall contain, in the order here stated: 1. A concise abstract or statement of the case, presenting succinctly, the questions involved, and the manner in which they are raised, which abstract shall refer to the page numbers in the transcript in such manner that pleadings, evidence, orders and judgment may be easily found. 2. A specification of errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. When the error alleged is to the admission or to the rejection of evidence the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. 3. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the page of the record, and the authorities relied upon in support of each point. 4. Citation of authorities shall be by title of case, and volume and page of report.

4. **RESPONDENT'S BRIEF.**—Counsel for respondent shall file with the clerk seven printed copies of his brief and serve one upon counsel of appellant at least five days before the day upon which case is set for hearing. His brief shall be of like character with that required of appellant, except that no specification of the issues shall be required, and no statement of the case, unless that presented by the appellant is controverted.

5. Briefs which do not conform to these rules will be returned to counsel by the clerk without filing.

6. **FAILURE TO FILE BRIEFS.**—When, according to this rule, appellant is in default, the case may be dismissed on motion; and when a respondent is in default, he will not be heard except on consent of his adversary and by request of the court.

VI.

ORAL ARGUMENTS.

1. The appellant, in this court, shall be entitled to open

and conclude the argument in the case; but when there are cross-appeals they should be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of the case. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party. But if a printed brief or argument is filed the adverse party will be entitled to be heard by two counsel.

3. One hour on each side will be allowed for the argument, and no more, without special leave of court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

VII.

TERM CALENDAR.

1. Cases shall be placed upon the calendar by the clerk in the order in which they are filed and docketed, but no cases shall be filed until the docket fees are paid.

2. **SETTING CASES FOR ARGUMENT.**—As often as found convenient cases will be set for argument by the court, as reached in the order in which they stand upon the calendar, except such cases as are, after motion, determined to be entitled to precedence.

3. **ADVANCEMENT OF CASES.**—Appeals in criminal cases, appeals from orders dissolving, or refusing to dissolve, granting or refusing to grant, writs of injunction; appeals from orders dissolving, or refusing to dissolve, attachments; appeals from orders or judgments holding appellant in custody; and all original proceedings are entitled to precedence, and will, upon motion of either party, be advanced on the calendar.

4. **SHORT CAUSES.**—There will be placed upon the short cause docket:

a. Cases in which counsel stipulate that the cause will be argued in fifteen minutes to the side, and that in their opinion the cause can be fully presented in such time:

b. Cases in which it is made to appear to the satisfaction of the court that the cause depends solely upon the former decisions of this court:

c. Cases in which it is made to appear to the satisfaction of the court by motion of either party, or upon the court's independent examination that the case could be fully presented by an argument of fifteen minutes on each side.

As many of such cases as practicable will be set for hearing on each Monday. Upon such hearing, the court, if it sees fit, may direct further argument, in which event the cause shall take its regular place on the calendar.

5. SUBMISSION OF BRIEFS BY STIPULATION.—Cases on appeal may be submitted on briefs at any time by filing stipulation of counsel to that effect, which cases will then be considered and determined when reached in chronological order.

VIII.

MOTIONS FOR RE-HEARING.

Motions for re-hearing, stating the grounds, points and authorities relied on, may be filed within fifteen days after the determination of the appeal. If prior to filing such motion remittitur has been issued, the same may be recalled by the court or any justice thereof. The motion for re-hearing will be considered without argument; and if granted, notice will be given, and such appeal re-set for further argument and consideration.

IX.

SUBMISSION OF MOTIONS.

1. MOTIONS TO BE FILED AND COPY SERVED.—All motions in this court shall be in writing, stating the grounds thereof, and filed, and copy served on counsel for adverse

party, if any counsel has entered an appearance; otherwise on clerk of the court for the party or counsel.

2. **MOTIONS GENERALLY DETERMINED WITHOUT ARGUMENT.**—As a general rule motions will be considered and disposed of without argument; but citation of authorities may accompany the motion.

3. **MOTION AFFECTING THE STATUS OF APPEALS.**—Motions to strike out parts of record, or to dismiss appeals, or otherwise affect the standing of the case in the appellate court, shall be stated in typewriting, specifying the ground thereof; accompanied by citation of authorities relied on, and filed; and copy thereof served on adverse party at least ten days before the case is set for hearing on the merits. Thereupon the adverse party may, within ten days after the service thereof, file and serve on the other, his brief, citing authorities, and explaining the record, in opposition to the motion. Such motion will then be considered and disposed of by the court without further argument.

X.

AS TO PERMISSION TO TAKE RECORD FROM CLERK'S OFFICE.

1. The record and other papers filed with the clerk of this court, may be examined in the clerk's office and in the court room upon the hearing, but shall not be taken therefrom except by counsel, on permission of the clerk, leaving a receipt with the clerk therefor; and when so taken shall not be retained out of the clerk's office more than ten days in any case, and shall be returned within a shorter period upon notice.

2. If permission to counsel to remove a paper or record is refused, application may be made to the court or any justice.

XI.

PROCEDURE IN CASE OF DEATH, DISABILITY OR TRANSFER OF INTEREST.

In event of the death, disability or transfer of interest of a

party to an appeal pending in this court, such fact shall be in writing suggested, and (unless the cause of action abate) the legal representative of the party deceased or disabled, or successor to the party transferring his interest, shall, on motion, be substituted, whereupon the adjudication will proceed.

XII.

COSTS ON APPEAL.

1. TO WHOM TAXED.—In all cases the costs of appeal shall be taxed against the unsuccessful party, unless otherwise ordered by this court, and the remittitur shall be accompanied by an itemized statement of such costs as are paid to the clerk of this court.

2. TO BE PAID BEFORE REMITTITUR ISSUE.—In conformity with the provisions of the statute requiring the clerk of this court to collect fees in advance, and pay the same into the state treasury, the remittitur from this court shall be sent to the trial court, or party applying therefor, only when the application is accompanied with payment of costs.

XIII.

ASSESSMENT OF DAMAGES FOR APPEAL WITHOUT MERIT.

If the court is satisfied from the record, and the presentation of the appeal, that the same was taken without substantial or reasonable ground of error, or cause for relief, but apparently for purposes of delay only, such damage will be assessed on determination thereof, as from the circumstances is deemed proper, to discourage the taking of appeals solely for unreasonable and vexatious delay.

XIV.

REMITTITUR, WHEN ISSUED.

Remittitur will, in cases where it is deemed proper, be ordered forthwith on determination of appeal; otherwise the

same will be issued on application at any time fifteen days thereafter; unless motion for re-hearing or modification of judgment has been made.

A copy of the opinion will accompany the remittitur when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order determining the proceedings in the trial court.

XV.

MANDATE FROM UNITED STATES SUPREME COURT—PROCEDURE THEREON.

Upon the receipt by the clerk of this court of a mandate from the Supreme Court of the United States in any case at law or in equity, theretofore taken from this court by writ of error or appeal to said Supreme Court, it shall be the duty of said clerk forthwith to issue under his hand and the seal of this court a remittitur to the district court of the district and county in which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in *haec verba* of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

XVI.

APPEALS FROM INJUNCTION ORDERS.—Upon appeal from injunction orders, if the appellant desires to continue in force the injunction order dissolved by the district court, or to obtain such an injunction order pending the determination of the appeal he shall file in this court his sworn application, setting forth the proceedings appealed from, and the relief desired, and present with it to this court a certified copy of the affidavits or evidence used on the hearing in the court below. Such applications will be heard *ex parte* and without argument, and

the court, upon such record, will make such order in the premises as to it may seem proper.

XVII.

ADMISSION OF ATTORNEYS.

1. ADMISSION UPON EXAMINATION.—Examination of candidates for admission to practice law in the courts of this state will be held in open court, in the court room, at 10 o'clock A. M. on the second days of the June and December terms of each year.

Any person desiring to enter for examination, must, at least ten days prior to the date of such examination, file with the clerk his verified petition, setting forth that he is a citizen of the United States, or a resident of this state who has *bona fide* declared his intention to become a citizen in the manner required by law, and that he is of the age of twenty-one years. He shall also file with his petition a certificate of two reputable counsellors at law that he has been engaged in the study of law for two successive years prior to the making of his application. He shall also file with his petition testimonials of his good moral character, which must be satisfactory to the court.

If the court is satisfied with the petition, and papers accompanying the same, the name of the applicant will be entered as a candidate for examination. He will be at once notified by the clerk of the acceptance or rejection of his application for examination.

The examination will be principally in writing. All candidates will be required at the commencement of the examination to state, upon their honor, that they will not seek or accept aid from any one in answering questions, or tender or render any such aid to another; that they will not consult any books or persons during any recess that may be granted, and that they will not remove from the court room any of the examination papers, or make copies of any of the same.

Examinations will be strict both as to elementary principles and the Codes and practice of this state.

The work of all candidates will be examined, and the results announced as soon as practicable.

2. ADMISSION OF ATTORNEYS FROM OTHER JURISDICTIONS.—Section 394 of the Code of Civil Procedure, 1895, is as follows: "Every citizen of the United States, or person resident of this state who has *bona fide* declared his or her intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of another state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, may be admitted to practice in the courts of this state, upon the production of his or her license, and satisfactory evidence of good moral character; but the court may examine the applicant as to his or her qualifications."

Candidates for admission under this section may make application in open court at any time. Application must be made upon motion of some counsellor of this court, and upon the verified petition of the applicant, showing the facts recited in Section 394, Code of Civil Procedure, and also:

a. Where, with whom, and the period of time the petitioner studied law, and where he was first admitted to practice; all places in which, and the period of time he has practiced as attorney or counsellor at law elsewhere than in this state.

b. Whether or not any proceedings for his disbarment, or criminal charges have been instituted or prosecuted against him in any jurisdiction, and if so, a statement of the time, place, circumstances, and result thereof. And

c. Such certificate must be accompanied by a certificate of the presiding judge of the highest trial court of record in which the petitioner last practiced, attested under the seal of said court, showing that the petitioner was of good reputation, and trustworthy in the practice of his profession as attorney and counsellor at law in such jurisdiction, which petition and

certificate last mentioned shall be filed and preserved in the office of the clerk of this court.

d. All such applicants for admission shall be personally present in court when the motion is made.

e. If, by reason of the fact that an applicant for admission from another jurisdiction has not practiced his profession for a considerable period, or if from any other reason, the court is of opinion that he should be required to pass an examination as to his qualifications, if his application in other respects conforms to the requirements for admission of attorneys from other jurisdictions, his name will be entered in the list of candidates for the next ensuing examination.

f. Every attorney admitted to practice must, before his certificate is issued to him by the clerk, take an oath to support the constitution of the United States, and the constitution of the state of Montana, and to faithfully discharge the duties of an attorney and counsellor at law with fidelity, to the best of his knowledge and ability. A certificate of his oath must be endorsed upon the license issued to the attorney, and a duplicate filed with the clerk.

g. All attorneys admitted to practice must sign the roll of attorneys kept by the clerk of the court, before the license is issued to him.

3. OBJECTIONS TO THE ADMISSION OF APPLICANTS.—Objection to the admission of an applicant to practice law in the courts of this state, may be made by any person filing with the clerk of this court a statement setting forth the grounds thereof; and thereupon, if such objection is deemed of sufficient weight, investigation thereof will be made in such manner as the court deems appropriate. •

These rules shall take effect upon January 1st, 1896, on which day all other rules will be considered repealed.

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ACCOUNTING.

Injunction in action for, see INJUNCTION, 2.

ADVERSE CLAIM.

Defined in *McCowan v. MacLay*, ante, page 234.

AGENCY.

Of vice principal of corporation, see NEGLIGENCE, 16.

1. Where a principal gives his agent telegraphic instructions, fairly susceptible of two constructions, and the agent honestly acts on that construction not intended by the principal, and repeatedly advises the principal of his acts, and the principal well knows of such acts, and of the agent's construction of the telegraphic instructions, yet does not advise his agent of his error, in such case, if loss thereby occurs to the principal he must be held to have accepted the agent's construction, and he cannot afterwards sue the agent for such loss.—*Coquard v. Weinstein*, 312.
2. In the case at bar the defendant, in October, telegraphed to the plaintiff as follows: "Sell, for my account, five hundred shares Elizabeth, at market price. Wire the price sold." Next day the plaintiff wrote defendant that the stock was extremely dull and impossible to sell at any reasonable figure, and that he would continue the order until countermanded, and he kept the defendant continually advised of the condition of the stock market and of the decline of the stock in price till the close of the year, but received no further instructions from the latter. The defendant contended that his telegram was a continuing order to sell at the highest price when the sale was made, while the plaintiff thought the order was to sell only for the price paid at the date of the receipt of the telegram. *Held*, that even if the plaintiff acted upon the erroneous construction of the telegram, the defendant, by his conduct discharged the plaintiff from all liability for such misconstruction.—*Id.*

AGREED CASE.

1. Where the appellate court had reversed a judgment rendered for defendant in an action tried upon an agreed statement of facts, from which the amount and date of plaintiff's recovery had been omitted by inadvertence of counsel, the trial court may permit the statement to be amended by inserting the amount and date of plaintiff's recovery,—no proof or inquiry being necessary to ascertain them, and their insertion not changing the terms of the statement or the understanding of the parties.—*Montana Milling Co. v. Jefferts*, 559.

AMENDMENT.

In attachment proceeding, see ATTACHMENT, 4, 5.
To complaint after verdict, see INSURANCE, 2.
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APPEAL.

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Sufficiency of complaint on, in lien foreclosure, see MECHANICS' LIEN, 7.

1. Where the issues in an action are purely those of fact, upon which there is a conflict of evidence, a verdict in such action will not be disturbed on appeal.—*Cabbage v. Schultz*, 14.

2. The exercise of the court's discretion in setting aside the findings of the jury, when they are absolutely and clearly against the evidence, will not be disturbed on appeal.—*Shepard v. First National Bank of Butte*, 24.
3. A verdict of the jury, concurred in by the court, will not be disturbed on appeal, unless it clearly appears that there was no evidence at all to sustain the verdict.—*Grace M. E. Church v. Richards*, 70.
4. Where there is a conflict in the evidence it is the province of the jury to settle the conflict and their determination will not be disturbed on appeal where there is evidence to support it.—*Felton v. West Iron Mt. Mtn. Co.*, 81.
5. It is the duty of the district judge to require the statement on appeal to be made correct in substance, and orderly and chronological in form, withholding his settlement until this is done, and not to leave it to the appellate court to decipher from an incongruous mass of material the matter which was before the trial court.—*Aulther v. Bennett Bros. Co.*, 110.
6. Where on remittitur to the district court, the court declined to modify the judgment so as to include certain property the supreme court will, on appeal, direct such modification to be made forthwith.—*Montana L. & Mfg. Co. v. Obelisk Mtn. & Con. Co.*, 117.
7. Where there is a substantial conflict in the testimony the appellate court will not disturb the verdict.—*Pearson v. Harper*, 143.
8. A judgment erroneous in form will be remanded at respondents' costs, where they have insisted on appeal that the judgment as entered was correct.—*Dugman v. The Montana Club*, 189.
9. It is no objection to the review of evidence contained in a statement on appeal that the appeal was not taken within sixty days from the rendition of judgment as required by section 421 of the Code of Civil Procedure, where the evidence is examined for the purpose of determining errors of law presented by the record,—as the refusal of a nonsuit and the giving of instructions.—*Gilliam v. Black*, 217.
10. Upon the hearing of a motion to dissolve an attachment, where the court heard no testimony other than the affidavits of the parties, the case on appeal must be decided by the appellate court precisely upon what was before the court below, that is, upon record evidence and nothing else.—*Newell v. Whitwell*, 242.
11. Upon disputed questions of fact, where there is a substantial conflict between the statements made by those who seek to dissolve an attachment and those who try to retain the lien thereof, this court will not disturb the decision of the court below, unless it is clearly against the preponderance of evidence. (*Landsman v. Thompson*, 9 Mont. 18, cited.)—*Id.*
12. The opinion of the district court is not a finding, nor a part of the judgment, so as to require its review by the appellate court when contained in the record.—*State ex rel. Mutual B. L. I. Co. v. First Jud. Dist. Court*, 274.
13. An order granting a motion for a change of venue will be affirmed on appeal where no error in the exercise of discretion appears, and no brief is filed or argument made by the appellant. (*City of Helena v. Brule*, 15 Mont. 420; *State v. Dakin*, 15 Mont. 556; cited.)—*Harris v. Ramsey*, 302.
14. Appeals, both from judgment and from a special order made thereafter, will be dismissed without prejudice where there is no judgment in the record and it does not appear that there was a judgment entered which could be supplied under suggestion of diminution of the record.—*Brunell v. Logan*, 307.
15. On an appeal from a judgment, the evidence when not contained in the record, will be presumed to support the judgment.—*Burns v. Paulsen*, 323.
16. A penalty for a frivolous appeal will be imposed by this court in affirming a judgment from which an appeal was taken apparently for delay and vexation of the plaintiff.—*Id.*
17. Where the court fully and fairly instructed the jury as to the law of the case, and there was ample evidence to sustain the verdict of murder in the first degree, such verdict will not be disturbed on appeal.—*State v. Pugh*, 348.
18. Where the error of the court upon which a reversal is ordered did not occur during the trial but arose in rendering a wrong judgment upon the facts as found and undisputed, a new trial is not necessary but the case will be remanded for the entry of a

proper judgment. (*Woolman v. Garringer*, 2 Mont. 405; *Collier v. Irvine*, Id. 587; *Barkeley v. Teufke*, Id. 485; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 553; *Stackpole v. Hallahan*, ante, page 40, cited.)—*Kimpton v. Jubilee Placer Min. Co.*, 379.

19. When the statement on motion for a new trial is stricken from the record on motion and the appellant's counsel concede that there is no error in the judgment roll, the judgment will be affirmed.—*The Montana Cattle Co. v. Forsythe*, 389.
20. Where an application for appointment as executor was denied for reason of non-residence under section 45 of the probate practice act, and at the time of hearing of an appeal from the judgment the Code of Civil Procedure of 1895 had taken effect, which, in section 2401 thereof, omitted the disqualification of said section 45, the case will be remanded with directions to dismiss the application without prejudice to the making of a new application under the law then in force.—*In re Connor's Estate*, 465.
21. A motion for a rehearing, not made until after the remittitur has been issued, to consider a point presented for the first time on such motion, will be denied, where the record was on file for seventeen months before the appeal was heard, voluminous briefs had been filed and counsel were allowed more than double the time for argument than the rule prescribes. (*Columbia Mining Company v. Holler*, 1 Mont. 429; *Davis v. Clark*, 2 Mont. 394, cited.)—*Merchants' Nat. Bank v. Greenwood*, 385.

APPEALABLE ORDER.

An order of the court refusing to appoint a receiver is not appealable. (*Wilson v. Davis*, 1 Mont. 38; *Stebbins v. Savage*, 5 Mont. 253, cited.)—*Cotter v. Cotter*, 68.

ASSAULT.

With deadly weapon, sufficiency of indictment, see CRIMINAL LAW, 1.

ASSESSMENT.

See TAXATION.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Partnership as assignee, judgment against one partner, see JUDGMENTS, 6.
See WAGE WORKERS' LAW.

1. Equity will aid a creditor who has obtained a judgment at law to reach the property of his debtor by removing fraudulent obstructions to the levy of execution thereon; and where a creditor, who has obtained a judgment in an action brought subsequent to an assignment by his debtor, seeks to levy an execution upon the property in the hands of the assignee, and upon which he had obtained a lien by attachment, and the sheriff returns upon the execution that no property is found to satisfy the execution except the property attached and which is embraced in an alleged assignment, wherefore the execution is returned unsatisfied, the creditor may maintain a bill in equity to remove such obstruction upon a showing that the transaction was fraudulent. Nor is it enough in such case that there is a remedy at law, but it must be as practical and efficient to the prompt administration of justice as the remedy in equity, which would not be the case, where, if the plaintiff resorted to his legal remedy and sold the property, a number of suits would be required before all claims were adjudicated some of which would have to be finally settled in equity, while an equity action to avoid the assignment brings all parties before the court for the final determination of their rights.—*Merchants' National Bank v. Greenwood*, 385.
2. The admission, on the trial of a suit in equity to have an assignment declared fraudulent, of a conversation between the plaintiff and one of the defendant assignors, occurring after the assignment had been made, in which the latter stated that they had hoped to borrow money and make a settlement with their creditors, but were prevented by plaintiff's action, if error, was not of such a prejudicial nature as to warrant a reversal of the case.—*Id.*
3. An assignee in trust for the benefit of creditors is not a purchaser for a valuable consideration within section 232, Fifth Division of the Compiled Statutes, excluding a purchaser for a valuable consideration, without notice of the fraudulent intent of his

grantor, from the operation of section 229, Id., declaring void every conveyance or assignment made with the intent to hinder, delay or defraud creditors, and therefore, in an action to have an assignment declared fraudulent, it is sufficient to establish the fraud of the assignor without showing that the assignee participated therein.—*Id.*

ATTACHMENT.

1. Plaintiffs attached the defendants on an account for goods sold on thirty and sixty days' credit and on an account for goods sold under a conditional credit agreement, printed and written on the bills, that the same should become due if any suit was brought against the purchaser. On motion to dissolve the attachment the defendants filed an affidavit to the effect that plaintiffs had agreed to extend a credit of five thousand dollars, and that, in consideration of the payment of eight per cent. interest on all bills not paid at the end of thirty and sixty days, only sums in excess of five thousand dollars should become due so long as defendants continued to trade with the plaintiffs; that the credit agreement on the bills was not called to the attention of defendants, nor made a part of their dealings at the time the goods were purchased, and that none of the debts were due or payable. A letter from the plaintiffs to the defendants, stating that they would accommodate them with a credit of five thousand dollars, charging eight per cent. interest on overdue accounts and asking for a property statement if the offer was satisfactory, and also invoices in which the credit condition did not appear, were attached to the affidavit as exhibits. Affidavits were filed by the plaintiffs denying defendants' version of the five thousand dollar credit arrangement and setting forth that as a condition of extending the proposed credit, defendants were required to furnish a property statement which was not done; that while selling goods to the defendants they delivered thirty-seven invoices, upon nearly all of which was distinctly printed the conditional credit agreement; that at no time were the defendants indebted to the plaintiffs to the extent of five thousand dollars; that all the invoices of the goods sued for contained the conditional credit agreement, and that the sum total of the amount due upon goods sold under the conditional credit agreement exceeded the sum total of the amount sued for. Letters were made part of plaintiffs' affidavit, in which defendants made remittances long before their credit approximated five thousand dollars, promised to clear their accounts up, and asked plaintiffs not to crowd them. The court required plaintiffs to elect whether they would amend their affidavit so as to exclude the amount of invoices upon which the credit agreement did not appear or submit to a dissolution of the attachment. *Held*, that an order dissolving the attachment upon plaintiffs declining to amend was error.—*Newell v. Whitwell*, 243.
2. Upon the hearing of a motion to dissolve an attachment, where the court heard no testimony other than the affidavits of the parties, the case on appeal must be decided by the appellate court precisely upon what was before the court below, that is, upon record evidence and nothing else.—*Id.*
3. Upon disputed questions of fact, where there is a substantial conflict between the statements made by those who seek to dissolve an attachment and those who try to retain the lien thereof, this court will not disturb the decision of the court below, unless it is clearly against the preponderance of evidence. (*Landsman v. Thompson*, 9 Mont. 18, cited.)—*Id.*
4. The procuring of an attachment is a proceeding within section 116 of the Code of Civil Procedure, and if such proceeding is defective, it may be amended in the furtherance of justice. (*Pierce v. Miles*, 5 Mont. 550; *Magee v. Fogarty*, 6 Mont. 237; *Joseph v. Mady Clothing Co.*, 13 Mont. 175, cited.) And the new Code of Civil Procedure of 1896, section 568, expressly provides for amendments to the affidavit in attachment.—*Id.*
5. Where one, in good faith has made a mistake in the amount of the indebtedness, to secure which an attachment was issued, it is within the power of the court to permit an amendment to be made, and judgment to be entered in the proper sum, so that the plaintiff should not lose his whole lien because of an inadvertent error.—*Id.*
6. Where part of the debt sued for is on an express and part on an implied contract an affidavit simply stating the affiants' conclusion, namely, that the defendants are indebted to the plaintiffs in a specified sum, upon an express and implied contract for

the payment of money, which is now due and payable, is a sufficient compliance with the requirement of section 181 of the Code of Civil Procedure, that the affidavit in attachment must show that the debt sued is upon contract.—*Id.*

7. Under our statute (sections 181, 182, of the Code of Civil Procedure, Compiled Statutes) requiring the clerk to issue the writ of attachment when the affidavit required by law has been filed and the necessary undertaking has been given, it was not contemplated that the clerk should exercise more than a ministerial duty in issuing the writ.—*Id.*
8. Under sections 203-202, of the Code of Civil Procedure, providing that a motion to discharge an attachment on the ground that the writ was improperly issued, may be made upon affidavits, and the plaintiff may oppose these affidavits by counter affidavits, or other evidence, in addition to those on which the order of attachment was made, an attachment may be dissolved for irregularities or imperfections in its issuance, not only apparent upon the face of the papers, but upon other grounds, wherein it is made to appear that the issuance of the writ was improper, but it is not within the scope of the inquiry under a motion to dissolve, to try the merits of the main action.—*Id.*
9. An affidavit in attachment which fails to state whether the contract sued upon is express or implied, and which imperfectly states the title of the court, is defective, but may be cured by amendment.—*S. C. Herbst Imp. Co. v. Hogan*, 384.
10. Abandonment is a question of intent, and where the acts of a plaintiff clearly indicate that he has no intention of abandoning an attachment lien, the mere issuance of an execution and its being returned unsatisfied, does not operate as an abandonment.—*Merchants' Nat. Bank v. Greenhood*, 385.

ATTORNEYS.

Fees of, constitutionality of statute taxing as costs, see CONSTITUTIONAL LAW, 1.

Unauthorized appearance of, see CONTEMPT, 1; JUDGMENTS, 7.

1. In proceedings to disbar an attorney, a finding that an attorney interlined matter in a decree entirely changing its effect and with a corrupt purpose, is supported by evidence that when the decree was examined by two attorneys for the party affected by the alteration immediately before it was signed, it contained no interlineations; that another attorney who had testified in the defendant's favor as to the time of making the interlineations, had stated upon being told that the decree was signed in open court, that if that was so he could do the respondent no good; that the decree was filed by defendant upon a peremptory order of the court after he had retained it for four months; and that after receiving intimation of disbarment proceedings had filed a motion to vacate or correct the decree, although he had been discharged as attorney for the plaintiff.—*State ex rel Hartman v. Cadwell*, 119.
2. A finding that certain notes were not delivered to respondent in payment for professional services and were without consideration, is sustained by evidence that a client of respondent, to defeat the collection of the costs of a criminal prosecution in which he had been convicted, had, upon the suggestion of respondent, executed to him the notes, secured by a mortgage, which were to be deposited in a bank subject to their joint orders; that respondent had then been paid for his services and had given his client a receipt in full; that he deposited the notes in bank with the exception of one for \$600 which, with the mortgage, he negotiated to an innocent purchaser; that when the client demanded the notes respondent gave him an order on the bank and told him he could not release the mortgage without having it present, but saying nothing about making claim to the note or mortgage until the client wrote him that they were not in the bank, when he replied that he would release the mortgage when the client paid the note.—*Id.*
3. A charge or conviction of crime is not a prerequisite to proceedings for the disbarment of an attorney. The question presented by such proceedings is not whether the respondent is guilty of a crime of which he has been or ought to be convicted, but whether under all the facts of the case, he is a fit person to be permitted to practice as an attorney.—*Id.*
4. One who entered into a corrupt scheme with an attorney to defeat the collection by the county of the costs of a criminal prosecution against the former, may, in proceedings to disbar the attorney, testify as to the details of the scheme.—*Id.*

CONSTITUTIONAL LAW.

AUSTRALIAN BALLOT LAW.

See ELECTIONS.

BIDDER.

"Lowest responsible," defined in *State ex rel. Eaves v. Rickards*, 145.

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To pay judgment, demand on sureties, see SURETIES, 1.

Of school district, see SCHOOLS, 1, 2, 3.

CERTIORARI.

An order made by a justice of the peace granting a new trial upon a motion therefor made more than ten days after the entry of judgment, although the notice of such motion was given within the statutory period, is an excess of jurisdiction and will be annulled by *certiorari*. (*Wallace v. Lewis*, 9 Mont. 399; *State v. Case*, 14 Mont. 520, cited.)—*State ex rel. Vocovitch v. Votaw*, 308.

CHANGE OF VENUE.

Order on, when affirmed on appeal, See APPEAL, 13.

CLAIM AND DELIVERY.

1. Under section 277 of the Code of Civil Procedure a failure to find all the facts that should be found by a jury in an action for the recovery of specific personal property does not invalidate the verdict. (*Miles v. Edsall*, 7 Mont. 185, cited.)—*Wheeler v. James*, 87.
2. In replevin a judgment may be rendered for the return of the property under a verdict.—"We, the jury, find for the defendants." The failure of the jury to find a verdict in the alternative is not a matter of which the plaintiff can complain, since upon a general verdict in such case an order for the return of the property follows as a matter of course. (*Anderson v. O'Loughlin*, 1 Mont. 81; *Lavell v. Lowry*, 5 Mont. 498, cited.)—*Id.*
3. A complaint in replevin which alleges in one count that goods of which defendant obtained the delivery by false representations were transferred to certain co-defendants as an assignment for benefit of creditors and in another count that the transfer was made in payment of a debt due by defendant to one of said co-defendants, is demurrable as uncertain and ambiguous, since it cannot be determined therefrom upon which of these contradictory allegations plaintiffs rely.—*Reed v. Potndexter*, 294.

CONSTITUTIONAL LAW.

Construction of Art. III, sec. 8, see CRIMINAL LAW, 7.

1. A statute taxing a reasonable attorney's fee as costs to the defendant against whose property a lien is filed, where judgment is rendered for the plaintiff in foreclosure, is constitutional. (*Wortman v. Kleinschmidt*, 12 Mont. 316, followed. *DE WITT*, J., dissenting.)—*Helena Steam Heating & Supply Co. v. Wells*, 65.
2. Section 3, Article XIII, of the State Constitution, providing that all moneys borrowed by any municipality, or other subdivision of the state, "shall be used only for the purpose specified in the law authorizing the loan," is not violated by the act of February 18, 1895, which provides that money loaned or advanced for school purposes on bonds of the district which are afterwards declared to be void by the supreme court of the state, may be repaid from the proceeds of the sale of subsequent bonds issued for school purposes. Nor is such act retrospective in its operation, and therefore within the inhibition of section 13, Article XV, of the constitution, providing that the legislature shall pass no law retrospective in its operation or which imposes upon the people of any county or municipal subdivision of the state, a new liability in respect to trans-

actions or considerations already past.—*State ex rel. Northwestern National Bank v. Dickerman*, 578.

3. A contract by county commissioners for the construction of a court house, the cost of which alone is to be less than ten thousand dollars, but which, together with the cost of ground, plans, and the hire of a supervising architect, greatly exceeds that sum, and which has not been authorized by any election, is within section 5, Article XIII, of the Constitution, prohibiting a county from incurring any indebtedness for any single purpose to an amount exceeding ten thousand dollars without the approval of the majority of the electors thereof.—*Hefferlin v. Chambers*, 249.
4. Section 8, Article III, of the State Constitution, provides for the prosecution of criminal actions by information "after examination and commitment by a magistrate, or after leave granted by the court," and under this provision an information may be filed after leave has been granted by the court, without an examination and commitment by a magistrate. Either there must have been an examination and commitment, or leave of court procured, but both steps are not required.—*State v. Brett*, 360.
5. The proceedings authorized by section 8, Article III, of the State Constitution, allowing prosecution by information with leave of court, without preliminary examination having been had, is not a deprivation of the liberty of the citizen without due process of law and does not abridge the privileges and immunities of any citizen as guaranteed by the fourteenth amendment of the constitution of the United States.—*Id.*

CONTEMPT.

Where one, without authority, employs counsel to represent a party to an action, *semble* that such conduct may constitute contempt under subdivision 9 of section 584, First Division of the Compiled Statutes, punishing as for a contempt "any unlawful interference with the process or proceedings of a court."—*Blaine v. Briegleb*, 582.

CONTRACTS.

By state furnishing board, mandamus to control, see STATE FURNISHING BOARD, 1, 2, 3. Custom and usage, when admissible to affect, see EVIDENCE, 3.

1. In a bond for title to an undivided interest in a mining claim, a provision that one-sixth of the net proceeds of all shipments of ore should be paid by the vendees to the vendor, to be applied on the agreed purchase price for such undivided interest in the claim, is wholly free from ambiguity, and the agreement cannot be varied or added to by parole evidence that, according to a custom among miners, all the expenses of mining, as well as the expense of shipping the ore, should be deducted before payments to vendor.—*Keeffe v. Doreland*, 16.
2. The fact that plaintiff, the secretary and a trustee of a corporation had never been appointed superintendent and his compensation fixed as required by the by-laws, will not prevent his recovering upon an implied contract for services rendered the corporation which were clearly outside of his ordinary duties and were performed under circumstances clearly raising the presumption that he and the corporate officers understood that they were to be paid for.—*Felton v. West Iron Mountain Mining Co.* 81.
3. Where defendant employed plaintiff as a foreman upon his ranch for one year under a contract by which the plaintiff was to receive as his compensation all the proceeds of the ranch products in excess of a certain sum, but before the expiration of the year the plaintiff, without fault of his own, is compelled to leave the ranch through the assaults, threats and orders of the defendant, he may recover upon *quantum meruit* for the services rendered to the time when defendant's conduct made the completion of the contract impossible.—*Kreyser v. Rehberg*, 331.
4. Where the assignee of a contract, who had agreed to perform all the terms thereof for and in the place of the assignor, brings an action for its breach and the defendant seek to recoup for the value of certain property delivered to plaintiff's assignor and which, under the terms of the contract, it was plaintiff's duty to return, it was error to exclude an itemized list of such property offered by defendant and accompanied with proof that the goods described in the list were delivered to the plaintiff's as.

signor by his predecessor under a similar contract.—*Bach, Cory & Co. v. Boston & Montana C. C. & S. M. Co.*, 467.

5. The liability of the assignee of a contract, bound under the terms of the assignment to perform all the terms of the contract for and in the place and stead of the assignor, relates back to the date of the contract and is not limited to the date of the assignment.—*Id.*

CONVEYANCE.

See **VENDOR** and **VENDEE**.

CORPORATIONS.

Liability to officers for services, see **CONTRACTS**, 2.

Legal capacity of, to sue, see **PLEADING**, 8, 9, 10, 11.

1. Under section 460, Fifth Division of the Compiled Statutes, every company is required to file an annual report showing, among other things, the amount of existing debts, and if any such company fails to do so, as provided in this section, all the trustees of the company become jointly and severally liable for all its indebtedness existing at the time such report should have been filed. (*Gans v. Switzer*, 9 Mont. 408, cited.)—*Elkhorn Trading Co. v. Tacoma Mtn. Co.*, 822.
2. In the case at bar B. was the general manager of the plaintiff trading company and was also one of the trustees of the defendant mining company and kept the books of both companies. After the mining company had ceased operations, the trustees thereof, in order to make out the annual report required by section 460, Fifth Division of the Compiled Statutes, inquired of B. what the amount of the company's indebtedness was to the plaintiff. He informed them that the mining company did not owe anything to the plaintiff and that the indebtedness to others was but trifling and he advised them not to make any annual report. They relied upon B.'s statement and, so relying thereon, omitted to make and file the annual report. It appeared that the statements were made by B. in order that the plaintiff might secure a personal liability against a trustee of the mining company who was financially responsible. *Held*, that the plaintiff was estopped to assert a right of action against the trustees of the mining company for a debt due from it to the plaintiff.—*Id.*

COSTS.

Motion to retax, when *res judicata*, see **RES JUDICATA**, 1.

COUNTERCLAIM.

In action for money paid, see **PLEADING**, 5.

COUNTIES.

1. Under section 751, Fifth Division of the Compiled Statutes, providing in effect, that execution shall not issue on a judgment against a county but the same shall be levied and paid by tax or other county charge, mandamus will not lie at the relation of a judgment creditor to compel payment of his judgment which was not recovered until after the levy for that year had been made, but the amount thereof shall be included in the statement of county expenses for the current year and is entitled to payment after the next levy based thereon.—*State ex rel. Graham v. Commissioners of Cascade County*, 271.
2. A contract by county commissioners for the construction of a court house, the cost of which alone is to be less than ten thousand dollars, but which, together with the cost of ground, plans and the hire of a supervising architect, greatly exceeds that sum, and which has not been authorized by any election, is within section 5, Article XIII, of the constitution, prohibiting a county from incurring any indebtedness for any single purpose to an amount exceeding ten thousand dollars without the approval of the majority of the electors thereof.—*Heffertin v. Chambers*, 349.

COUNTY SURVEYOR.

Compensation of, see OFFICERS, 3.

CRIMINAL LAW.

Sufficiency of motion for new trial in criminal cases, see NEW TRIAL, 11-15.

1. An indictment for an assault with a deadly weapon to do a bodily injury, under section 60, page 511, of the Compiled Statutes, is not rendered insufficient because of the omission therein of the technical word "feloniously," in the averment of the assault itself, where the intent with which the assault was made is specifically alleged to have been feloniously to inflict the injury.—*State v. McCaffery*, 33.
2. A defendant waives any rights he may have to object, either to the original verification of the complaint before the committing magistrate, or to the verification of the information in the district court, by pleading to the merits in such court.—*Id.*
3. Where an information has been filed before the examination and commitment of the defendant, an appropriate remedy is by motion to quash, under section 206 of the Criminal Practice Act, upon the ground that the information was not presented as prescribed by law.—*Id.*
4. Under section 206 of the Criminal Practice Act, if a defendant, on a second trial, does not ask to withdraw the plea of not guilty, interposed at the first trial, and have another and different plea substituted, it is a waiver of any grounds of objection to the information which might have been properly raised by motion to quash.—*Id.*
5. On a trial for assault with a deadly weapon, the jury did not deliver or return any verdict into court, as required by section 834 of the Criminal Practice Act. At a second trial the defendant interposed a plea of former jeopardy, and offered to show that on the former trial the jurors agreed to acquit him of the charge, as set forth in full in the information, and find him guilty of simple assault only, and that their disagreement was as to the amount of the fine which should be by them imposed. Held, that this offer of the defendant was properly excluded by the court. (*In re Thompson*, 9 Mont. 381, cited.)—*Id.*
6. The exercise of the power of the court to discharge the jury when unable to agree on a verdict, as authorized by section 881 of the Criminal Practice Act, cannot be the subject of review, where the record is silent as to the length of time the jury deliberated.—*Id.*
7. The proper construction of the words "probable cause," as used in the state constitution (art. 3 § 8), may be facts embodied in a complaint which charges the offense upon information and belief.—*Id.*
8. In the case at bar it appeared that defendant and one H. T. Swenson were lessees of a mine, working it under an agreement between themselves that all the ore should be shipped in the name of said S.; that defendant, after delivering certain ore and receiving a check therefor in the name of H. J. Swenson, inquired of S. what his initials were, and, upon being told, said that he had made a mistake and given them as "H. J.;" that S. then told him it was no matter as he (S.) could get the check cashed; that defendant without authority, and permitting himself to be identified as the payee, indorsed the check, cashed it and retained the money. Held, that the facts were sufficient to sustain a conviction for forgery.—*State v. Vineyard*, 138.
9. It is forgery to sign a money order or check of apparent legal efficiency in an assumed name, if the name is assumed to defraud the person to whom the order or check is given, or if under such circumstances as are likely to defraud.—*Id.*
10. On a trial for murder, evidence of statements made by the defendant when captured about a quarter of a mile away from where the shooting took place and immediately after having fired the fatal shot, to the effect that the deceased hit him in the face and then he shot him, and of statements made by the deceased a short time after the shooting, that the defendant applied to him opprobrious epithets and he struck him, was properly excluded, as such statements were the narrations of events that had passed and not part of the *res gestae*. (*Territory v. Clayton*, 8 Mont. 1, cited.)—*State v. Pugh*, 343.
11. Where the court fully and fairly instructed the jury as to the law in the case, and

- there was ample evidence to sustain the verdict of murder in the first degree, such verdict will not be disturbed on appeal.—*Id.*
12. On a trial for murder, evidence taken before the coroner and offered by the defendant for the purpose of impeaching the state's witnesses, was properly excluded where such evidence was in no way identified as that taken before the coroner, nor was it presented to the witnesses sought to be impeached to enable them to say whether it was their testimony given before the coroner, nor was it shown that, if admitted, it would have contradicted any witness as to any material matter.—*Id.*
 13. Section 8, Article III, of the constitution, provides for the prosecution of criminal actions by information "after examination and commitment by a magistrate, or after leave granted by the court," and under this provision an information may be filed after leave has been granted by the court, without an examination and commitment by a magistrate. Either there must have been an examination and commitment, or leave of court procured, but both steps are not required.—*State v. Brett*, 380.
 14. The proceeding authorized by section 8, article III, of the state constitution, allowing prosecution by information with leave of court, without preliminary examination having been had, is not a deprivation of the liberty of the citizen without due process of law and does not abridge the privileges and immunities of any citizen as guaranteed by the fourteenth amendment of the constitution of the United States.—*Id.*
 15. A city warrant or order, regular on its face, and apparently drawn according to law on the city treasurer, signed by the mayor and countersigned by the city clerk, for the payment of moneys out of a specific fund, is a draft, and is therefore the subject of forgery under section 96, Fourth Division of the Compiled Statutes, making it forgery to "falsely make, alter, forge or counterfelt any writing obligatory, draft, etc."—*Id.*
 16. Where a city warrant purporting on its face to be good and valid for the purposes for which it was made, is altered with the intent to defraud, the crime of forgery is complete. (*State v. Vineyard*, ante, page 138.)—*Id.*
 17. On a prosecution for forgery of a city warrant, it is no defense that the city had exceeded the constitutional limit of its indebtedness at the time the warrant in question was issued.—*Id.*
 18. The district court may properly revoke its leave given to the county attorney to file an information against a county commissioner, charging him with extortion, where it appeared upon motion to set aside the information, that the grand jury had investigated the defendant's conduct, and, while finding that illegal payments had been made to him, found no indictment, and no showing was made by the county attorney either at the time of the filing of the information or at the time of defendant's motion, that the case was a proper one for further prosecution. (*State v. Brett*, ante, page 380, cited.)—*State v. Cain*, 561.
 19. On a prosecution for grand larceny where others are indicted jointly with the appellant, evidence of acts and statements of the codefendants, made after the theft but before the sale of the stolen property, is admissible against the appellant as part of the *res gestae*.—*State v. Byers*, 565.
 20. A transcript of the stenographer's notes of the testimony which a witness, since deceased, gave at a preliminary examination, supported by the testimony of the stenographer as to its correctness, is admissible against the defendant on the trial of the case, where the defendant had cross-examined the witness at the preliminary examination. (*State v. Lee*, 13 Mont. 248, distinguished.)—*Id.*

CUSTOM AND USAGE.

Evidence of, when inadmissible, see EVIDENCE, 3.

DAMAGES.

See NEGLIGENCE.

DEFAULT.

Judgment by, vacation of, see JUDGMENTS, 1, 4, 5.

DEMURRER.

Generally, see PLEADING.

Sufficiency of ruling on, see PLEADING, 4.

DISTRICT COURT.

Opinion of, review, see APPEAL, 12.

A district court has the right to control its own docket and determine the order in which cases may be tried.—*Merchants' National Bank v. Greenhood*, 395.

EASEMENT AND SERVITUDE.

1. An original claimant of a lot in a townsite, entered according to the act of congress of March 2, 1867, and the territorial laws of Montana in relation thereto, is not the owner in fee of the street or alley upon which his lot abuts, and has only an easement therein. (*Hershfield v. Rocky Mt. Bell Telephone Co.*, 12 Mont. 102, cited.)—*Loefer v. Butte General Electric Co.*, 1.
2. A pole used for electric light purposes is within an urban servitude, where it appears that the pole in question is intended to serve public interests.—*Id.*
3. The defendant, an electric light company, under contract with a city to light the streets and public buildings of the city, erected one of its poles about the middle of a sidewalk in an alley, the rear entrance to the plaintiff's saloon being about twenty feet distant from the pole. By an ordinance of the city council the defendant was required to erect new poles throughout the city, and only on one side of the street, and by reason of this requirement the use of the alley for the erection of poles was rendered necessary. It was shown that there was no serious interference with the air or light to the plaintiff's property, or access thereto, from the location of the pole complained of. Held, that there was no unreasonable use of the streets by the city, and no substantial interference with any of the rights of the plaintiff, against which a court of equity would interfere by injunction.—*Id.*

EJECTMENT.

Judgment in action of, see JUDGMENTS, 3.

To recover mining property, see MINES AND MINING, 1, 3.

ELECTIONS.

1. In the construction of election laws in a monarchy, the tendency is to limit and restrict the electoral franchise, but an opposite construction prevails in a republic. The whole tendency of American authority is towards liberality, to the end of sustaining the honest choice of electors, and an election law which we import from a monarchy should not, therefore, be subjected strictly to the rule that the importation of a statute imports also its construction. (*Price v. Lush*, 10 Mont. 61, modified and limited.) *Stackpole v. Hallahan*, 40.
2. The provisions of sections 11 and 12 of the act of March 13, 1889, commonly called the "Australian Ballot Law," prescribing certain facts to be stated in a certificate of nomination, are not to be held to be mandatory in a case where the nomination has been duly made, a certificate filed, the name placed upon the ballot, the candidate voted for and elected by a plurality of all the legal votes cast, and where the effect of giving a mandatory construction to such provisions would be absolutely to disenfranchise a plurality of the voters of the district, although the honesty and fairness of the election have never been questioned. The act does not contemplate that an election shall be declared null by reason of nonprejudicial defects in the nominating certificate.—*Id.*
3. In the case at bar W. was nominated by a political convention as a candidate for county treasurer, but his certificate of nomination was never filed, and he declined the nomination to the county committee of the party, and the said committee filled the vacancy by nominating H., and by filing a certificate of his nomination with the county clerk. In making and filing H.'s certificate, it did not technically comply with

the provisions of sections 11 and 12 of the Australian Ballot Law (Act of March 13, 1889,) in the following particulars: 1. W. did not decline his nomination in writing, notifying the officer with whom the certificate of nomination is required to be filed, of his declination; 2. H.'s certificate did not show that he was nominated to fill a vacancy; 3. Nor set forth the cause of the vacancy; 4. Nor give the name of the person for whom H. was to be substituted; 5. Nor set forth that the committee had authority to fill the vacancy; 6. Nor set forth in direct language the business address of H.; 7. Nor the business address of the chairman or secretary of the party committee making the nomination. *Held*, that no objections to such defects having been made until after an election, honestly and fairly conducted, the provisions of the statute as to certifying nominations should be construed as directory only, and the election should stand. (*First National Bank v. Neill*, 13 Mont. 382; *State ex rel. Pigott v. Benton*, 13 Mont. 308, cited.)—*Id.*

ELECTRIC LIGHT COMPANY.

Use of streets and alleys for poles, see EASEMENT AND SERVITUDE, 2, 3.

EMINENT DOMAIN.

1. The character of a way, whether it is public or private, is determined by the extent of the right to use it and not by the extent to which that right is exercised.—*Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co.*, —.
2. Under sections 5 and 7 of article XV of the constitution declaring that all railroads shall be public highways, and common carriers, and prohibiting discrimination in charges or facilities for transportation of freight or passengers, a railroad, though built by a private corporation and with its main line and spurs running convenient to private mines and ore houses, is none the less a public use and may exercise the right of eminent domain.—*Id.*
3. In this state, where mining is the dominant industry, the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks and spurs to mines and mining works, as public uses, by virtue of the law of eminent domain.—*Id.*
4. The right of eminent domain may be exercised by one railroad as to the right of way of another road when the latter's right of way is twenty-five feet on each side of the center of its track which runs along the side of a mountain, but which was only graded a little more than necessary for the actual space occupied by its road bed, and the adjacent portion of the right of way on the upper hill side which was sought to be condemned, was not used, nor could be used without heavy excavation work, it being necessary by reason of the character of the mountain side and the necessity of crossing several spurs of the defendant road, that the plaintiff road be laid down to the same level as the other, it being wholly impracticable and unreasonable to go low enough to pass beneath the spurs, and to build overhead would require the plaintiff road to run into the mountain at enormous expense and switch back in order to reach the objective points of the two roads, besides materially interfering with the quartz mining operations in the vicinity, while in going upon defendant's right of way the plaintiff road would merely widen the cuts already made by the defendant road, causing no material damage, the distance between the centers of the tracks being from seventeen to twenty-two feet, and the principal object of both roads in their branches about the mountain being to haul ores from the mines. Nor would it be any objection to the condemnation of such portion of defendant's right of way, that such occupancy by the plaintiff road would render it difficult for the defendant road to construct switches or side tracks and to handle ties. It appearing that a distance of twenty-two feet between the centers of the tracks would leave room for another track, and where the elevation of the plaintiff road was so high as to prevent the defendant road from crossing at right angles a spur could be run to attain the proper elevation. Nor would the fact that the defendant road might require the condemned portion of its right of way in the future for a double track be sufficient to prevent such occupancy by the plaintiff road where the necessity was a mere future possibility and not based upon reasonably apparent traffic needs.—*Id.*

5. The mere fact that the defendant road might be inconvenienced in the operation of their trains at the various crossings of the plaintiff road would constitute no objection to plaintiff's occupancy, since the right of one railroad to cross another is expressly given by section 5, article XV, of the constitution.—*Id.*
6. Where a railroad, which traverses the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful and safe operation of its system of tracks and spurs, and which have not been used by it during the several years of its construction in connection with any such operations, and in all reasonable probability not necessary for any such future use, and another road in seeking the same objective points is obliged to take parts of such unused right of way to avoid a considerably more circuitous route at a different grade, of very much greater cost and of serious damage to many mining properties, and would, in any event, be obliged to parallel the adversary road a part of the way, under such conditions the taking of the unused parts of the right of way of the one railroad by the other is a more necessary public use, within the meaning of section 601, First Division of the Compiled Statutes, providing that before property already appropriated to some public use may be again taken, it must appear that the public use to which it is to be applied is a more necessary public use. And under this statute it is not necessary that the new public use should, in all cases, be a different public use.—*Id.*
7. The word "necessary" as used in section 601, First Division of the Compiled Statutes, permitting lands appropriated for a public use to be again taken for a more necessary public use, does not mean an absolute necessity for the particular location sought, but a reasonable necessity to be determined from considerations of practicability, economy and facilities, under the particular circumstances of the case, having regard to senior rights and the benefits to the public.—*Id.*
8. The fourth subdivision of section 600, First Division of the Compiled Statutes, provides that all rights of way shall be subject to be connected with, crossed or intersected by any other right of way and that "They shall also be subject to a limited use in common with the owner thereof when necessary." *Seem*, that the right of a railroad to condemn a portion of the right of way of another railroad, not in actual use, would not be limited to crossings or intersections only, but would extend to a longitudinal taking.—*Id.*
9. Where a spur of the defendant railroad, used for a particular mine, is on the north side of its track, while the mine is on the south side, and the grade of the plaintiff's track is above the grade of the spur at the point of crossing and it would be more convenient for the defendant railroad to have the spur on the south side of their main track, the court will order the plaintiff road, at its own expense to rebuild the spur already constructed, upon the south side of the defendant's main track and provide suitable approaches to it for teams.—*Id.*
10. Where there was a slight difference of elevation of grades of the two roads at the crossing of a spur of the defendant road and the only practicable way of crossing was to raise the grade of the spur from the switch to the point of intersection, the court will order the crossing to be so made at the expense of the plaintiff road.—*Id.*
11. Where, in order for the plaintiff road to cross a spur of the defendant road without raising the grade of the latter's track, it was necessary to construct a reverse grade which made a "hump" in the road and which was objected to as dangerous in that it might cause the plaintiff's trains to break in two which would obstruct the defendant's tracks with wreckage, the court will not disturb the crossing as so constructed, it appearing that its dangerous tendencies were only indirectly to the defendant road and the evidence of skilled engineers as to the feasibility of the crossing was conflicting.—*Id.*
12. In condemnation proceedings by a railroad company to obtain parts of the right of way of another road the question of damages for crossings may be properly referred to commissioners, under section 607, First Division of the Compiled Statutes.—*Id.*
13. When the employment of a watchman is made necessary by one railroad crossing another, the road invoking the right to make the crossing should be allowed to select the watchman but should be required to bear his expense.—*Id.*
14. The right of a railroad to cross the tracks of another road, will not be defeated merely because the crossing will require the grade of the latter's road to be raised a

foot and a half at one point, where the crossing at such point is wholly practicable and the grade is made necessary by the distance and grade between other crossings. Nor will the right to so cross be defeated merely because it will somewhat curtail the latter's storage tracks. — *Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co.*, —.

15. Where the district court had directed the plaintiff railroad which was seeking to cross the defendant's track at a point where it maintained a "three-throw" switch, to move the defendant's switch north so as to allow the plaintiff's road to cross one track, instead of three, of the defendant's, and to procure title for the defendant road to the new ground necessary for the changed right of way, such order will be modified on appeal so as to require the plaintiff road to swing its road further to the north, and make if necessary, three crossings beyond the switch and thereby obviate the necessity of moving the defendant's switch off of their present right of way. — *Id.*

EQUITY.

1. In an action for equitable relief, the findings of the jury are advisory merely, and the erroneous refusal of a challenge to a juror, who participated in the findings, is no ground for reversal, where such findings were not attacked at all, or, if so, by insufficient specifications of error. (*Leggatt v. Leggatt*, 19 Mont. 180, cited.) — *Zickler v. Deegan*, 198.
2. Equity will aid a creditor who has obtained a judgment at law to reach the property of his debtor by removing fraudulent obstructions to the levy of execution thereon, and where a creditor, who has obtained a judgment in an action brought subsequent to an assignment by his debtor, seeks to levy an execution upon the property in the hands of the assignee, and upon which he had obtained a lien by attachment, and the sheriff returns upon the execution that no property is found to satisfy the execution except the property attached and which is embraced in an alleged assignment, wherefore the execution is returned unsatisfied, the creditor may maintain a bill in equity to remove such obstruction upon a showing that the transaction was fraudulent. Nor is it enough in such case that there is a remedy at law, but it must be as practical and efficient to the prompt administration of justice as the remedy in equity, which would not be the case, where, if the plaintiff resorted to his legal remedy and sold the property, a number of suits would be required before all claims were adjudicated, some of which would have to be finally settled in equity, while an equity action to avoid the assignment brings all parties before the court for the final determination of their rights. — *Merchants' National Bank v. Greenwood*, 395.
3. An assignee in trust for the benefit of creditors is not a purchaser for a valuable consideration within section 232, Fifth Division of the Compiled Statutes, excluding a purchaser for a valuable consideration, without notice of the fraudulent intent of his grantor, from the operation of section 229, *Id.*, declaring void every conveyance or assignment made with the intent to hinder, delay or defraud creditors, and therefore, in an action to have an assignment declared fraudulent, it is sufficient to establish the fraud of the assignor without showing that the assignee participated therein. — *Id.*

ESTOPPEL.

In the case at bar B. was the general manager of the plaintiff trading company and was also one of the trustees of the defendant mining company and kept the books of both companies. After the mining company had ceased operations, the trustees thereof, in order to make out the annual report required by section 460, Fifth Division of the Compiled Statutes, inquired of B. what the amount of the company's indebtedness was to the plaintiff. He informed them that the mining company did not owe anything to the plaintiff and that the indebtedness to others was but trifling and he advised them not to make any annual report. They relied upon B.'s statement and, so relying thereon, omitted to make and file the annual report. It appeared that the statements were made by B. in order that the plaintiff might secure a personal liability against a trustee of the mining company who was financially responsible. *Held*, that the plaintiff was estopped to assert a right of action against the trustees of the mining company for a debt due from it to the plaintiff. — *Elkhorn Trading Co. v. Tacoma Mining Co.*, 322.

EVIDENCE.

Parole, to vary contract, see **CONTRACTS**, 1.

Parole, to vary contract, see **NEW TRIAL**, 7.

Of former jeopardy, see **CRIMINAL LAW**, 5.

Newly discovered, see **MINES AND MINING**, 2.

To sustain conviction for forgery, see **CRIMINAL LAW**, 8, 9.

Res gestae, see **CRIMINAL LAW**, 10, 19.

Statements of conspirators, see **CRIMINAL LAW**, 19.

Taken before coroner, when inadmissible, see **CRIMINAL LAW**, 12.

In action for negligence in causing overflow of water, see **NEGLIGENCE**, 8, 9, 10, 11.

Testimony of deceased witness, see **CRIMINAL LAW**, 20.

1. An alleged oral acceptance by defendant's intestate, of an order for four hundred and twenty-eight dollars, drawn by contractors who had constructed his house, being denied, it was error to refuse defendant's offer to prove that, at the time of the alleged acceptance, there was no indebtedness to the contractors other than one hundred and fifty dollars, which had been paid to plaintiffs, that the contractors were building other houses at the time, and that the balance of plaintiff's bill, for which the order was given, was for materials which had been used in part in other buildings, since such facts, if proven, would tend to show that the order had not been accepted. — *Lavelle v. Frost*, 93.
2. Where the assignee of a contract, who had agreed to perform all the terms thereof, for and in the place of the assignor, brings an action for its breach and the defendant seeks to recoup for the value of certain property delivered to plaintiff's assignor and which, under the terms of the contract, it was plaintiff's duty to return, it was error to exclude an itemized list of such property offered by defendant and accompanied with proof that the goods described in the list were delivered to the plaintiff's assignor by his predecessor under a similar contract. — *Bach, Cory & Co. v. Boston and Montana C. C. & S. M. Co.*, 467.
3. Evidence of a usage prevailing among physicians of a particular locality, that where one employs another to assist him in a case, the assistant is to look to the patient for his pay in the absence of a special agreement to the contrary, is inadmissible in an action by one physician to recover of another for such services, where it did not appear that such usage was known to the plaintiff or that it was so well established as to warrant the legal presumption that the parties contracted with reference thereto. — *Fitzgerald v. Hanson*, 474.
4. It is often that fraud cannot be proved by direct evidence, and where its existence is the main issue in an action, a wide latitude of evidence is therefore allowed in order that it may be detected and exposed. — *Merchants' National Bank v. Greenwood*, 395.

EXECUTION.

Injunction to restrain levy of, on property in hands of receiver, see **RECEIVER**, 2.

Order staying, correction of, see **NEW TRIAL**, 5.

EXECUTORS AND ADMINISTRATORS.

Where an application for appointment as executor was denied for reason of non-residence under section 45 of the probate practice act, and at the time of the hearing of an appeal from the judgment the Code of Civil Procedure of 1895 had taken effect, which, in section 2401 thereof, omitted the disqualification of said section 45, the case will be remanded with directions to dismiss the application without prejudice to the making of a new application under the law then in force. — *In re Connor's Estate*, 465.

FEES.

Of attorneys, taxation of as costs in lien foreclosure, see **CONSTITUTIONAL LAW**, 1.

Collection of illegal, by justice of the peace, see **OFFICERS**, 1, 2.

FINDINGS.

Of jury, setting aside by district court, see **APPEAL**, 2.

Of jury in equity action, advisory, see EQUITY, 5.

Conflict between special, and verdict, see INSURANCE, 1.

Special findings control the judgment, even if the general verdict is contrary thereto.—*Kimpton v. Jubilee Placer Mining Co.*, 379.

FORECLOSURE.

Of Mechanics lien, see MECHANICS' LIEN, 1.

Validity of law taxing attorneys fees on, see CONSTITUTIONAL LAW, 1.

Judgment for deficiency on, see MORTGAGES, 1.

FOREITURE.

Of mining claim, resumption of work to prevent, see MINES AND MINING, 8, 9.

FORGERY.

Evidence to sustain conviction for, see CRIMINAL LAW, 8, 9.

FORMER JEOPARDY.

Evidence as to, see CRIMINAL LAW, 5.

FRAUD.

In transactions between husband and wife, see HUSBAND AND WIFE, 1, 2, 3.

In assignment for benefit of creditors, see ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2, 3.

1. Where an answer alleges fraud, and contains other allegations which are absolutely contradictory of and inconsistent with the allegation of fraud, such allegations are properly stricken out.—*State ex rel Northwestern Nat. Bank v. Dickerman*, 278.
2. It is often that fraud cannot be proved by direct evidence, and where its existence is the main issue in an action, a wide latitude of evidence is therefore allowed in order that it may be detected and exposed.—*Merchants' Nat. Bank v. Greenwood*, 395.
3. Although the appellate court may not be wholly satisfied as to the evidence of fraud in conveyances by a defendant assignor to third parties, and as to the participation in such fraud by the assignee, yet, where there is as ample evidence as in this case to support the findings of the jury in these respects the verdict will not be disturbed.—*Id.*

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. Money transactions between husband and wife, when creditors of the husband are concerned, should be carefully scrutinized, lest the intimate relations of such persons should be the convenient means of working fraud against creditors. But it is not fraud *per se* for a husband to pay his wife a debt which he honestly owes her. (*Lambrecht v. Patten*, 15 Mont. 260, cited.)—*Shepard v. First National Bank*, 24.
2. Where a husband, being insolvent, and owing both his wife and a bank, paid the debt to his wife in full by deeding to her property of less value than the amount of the debt, which property he obtained by money drawn from the bank, and the bank took no step to subject the property to its claim until fourteen months after the deed was made, and until a considerable time after full knowledge of all the circumstances, but permitted the husband's overdraft to continue at the bank, and to increase at one time in the course of business to two thousand dollars in excess of what it was when the first payment was made on the property, this is evidence clearly tending to show that the bank did not regard the transaction as fraudulent during that period, and the transfer of the property to the wife, in such case, was not fraudulent *per se*.—*Id.*

3. In conversion by a wife to recover the value of property claimed by her, but seized under an attachment against her husband, the granting of a new trial, after a verdict for plaintiff, was not an abuse of discretion, where it appeared in evidence that the husband after marriage had turned over to his wife his money and property, she having no property at the time, and thereafter managed it as her agent; and that upon examination as to the good faith of the transaction he had denied that the transfer was made to place the property beyond the reach of creditors, but qualified it by saying, that when a certain person "was going to sell him out and give him no show, a man would be a fool for not protecting himself."—*Kendall v. O'Neal*, 308.

INFORMATION.

Waiver of objections to, see CRIMINAL LAW, 2.

Motion to quash, see CRIMINAL LAW, 3, 4.

Revocation of leave to file, see CRIMINAL LAW, 18.

INJUNCTION.

To restrain erection of poles in streets by electric light company, see EASEMENT AND SERVITUDE, 3.

To restrain levy of execution on property in hands of receiver, see RECEIVER, 2.

To restrain municipal indebtedness, see MUNICIPAL CORPORATIONS, 1.

1. The granting or refusing of an injunction is a matter of discretion in the court, dependent upon the facts of the particular case. (*Blue Bird Mining Co. v. Murray*, 9 Mont. 468; *Klein v. Davis* 11 Mont. 155, cited.)—*Cotter v. Cotter*, 63.
2. In an action for an accounting, and for the cancellation of certain deeds to real estate, the plaintiff also asked for a temporary injunction, which the court issued on the filing of the complaint. One of the defendants filed an answer denying all the allegations of the complaint, and alleging that the plaintiff had no interest in any of the property mentioned therein. The other defendants demurred to the complaint, and the plaintiff filed no replication to the new and affirmative matter set up in the answer. Upon the hearing of a motion to dissolve the temporary injunction, the court had before it the complaint and answer, both verified. *Held*, there was no abuse of discretion on the part of the court in ordering a dissolution of the temporary injunction.—*Id.*

INSTRUCTIONS.

As to duty of employer, in action for death of employe, see NEGLIGENCE, 6.

As to fraud in locating mining claim, see MINES AND MINING, 5.

Misleading, as ground for new trial, see NEW TRIAL, 8.

As to duty of owner of irrigating ditch, see NEGLIGENCE, 12.

It is error to give instructions not warranted by the evidence.—*Walsh v. Mueller*, 180.

INSURANCE.

1. In an action upon an insurance policy for six hundred dollars which contained a clause "\$1,800 total concurrent insurance permitted" a general verdict for the plaintiff was properly set aside and judgment rendered for the defendant on the special findings of the jury that there was no understanding at the time of the issuance of the policy that the insurance might be increased to the aggregate amount of thirty-six hundred dollars, as contended by plaintiff, or that prior policies aggregating eighteen hundred dollars which would shortly expire might be renewed.—*Neimick v. The American Ins. Co.*, 318.
2. In an action on an insurance policy where the plaintiff alleged and relied upon an agreement between himself and the insurance company, that additional insurance might be taken in excess of the amount, limited by the policy, and upon the trial proved that the insurance company, having knowledge of this additional insurance made no objection thereto, and, after a verdict had been returned and the jury discharged, offered to amend his complaint to conform to such proof, the amendment was properly refused as inconsistent with the agreement upon which the right to recover was based, and also because made too late.—*Id.*

INTEREST.

Sufficiency of pleading to sustain judgment for, see PLEADING, 6.

An acknowledgment by an assignee for the benefit of creditors, of the correctness of a claim for wages against his assignor, upon receipt of the notice of such claim, constitutes a settlement of the account so as to entitle the wage worker to interest under a statutory provision allowing interest on money due on the settlement of accounts, from the day of such settlement.—*Knatz v. Wise*, 555.

JUDGMENTS.

Against county, how paid, see COUNTIES, 1.

For deficiency on foreclosure of mortgage, see MORTGAGES, 1.

1. The defendant's attorney was informed by the clerk that no business would be transacted by the court until after a certain date, and, relying upon this statement, the attorney did not appear until such date, when he ascertained that his pending demurrer had been overruled, and a default entered. Held, that the court below did not err in holding that the negligence of the defendant was excusable, and the default was properly opened. (*City of Helena v. Brule*, 15 Mont. 429, distinguished.)—*Anaconda Mtn. Co. v. Sattle*, 8.
2. In opening a default against the defendant upon the ground of his excusable negligence, a denial of the plaintiff's request to impose as a condition that the defendant should not be allowed to plead the statute of limitations is not error.—*Id.*
3. In an action of ejectment to recover an undivided interest in a mining claim, a judgment in favor of the plaintiff should be for the possession of such undivided interest, and not for that of the whole mining claim. (*Hopkins v. Noyes*, 4 Mont. 550, cited.)—*Keeffe v. Doreland*, 16.
4. Granting a motion to vacate a default against a city is an abuse of discretion where the affidavit filed in support of the motion and to show excusable neglect merely stated that affiant, who was the city attorney at the time of the motion, had an impression from some source that the matter was disposed of and that he was unable to state why the city was allowed to be in default, and it also appeared from the record that the default was taken over five years after the defendant's time for answering had expired and was then suffered to stand for fifteen months without any effort being made to vacate it.—*Chambers v. City of Butte*, 90.
5. It is not an abuse of discretion to refuse to vacate a default on the ground of excusable neglect where sickness in the family of defendant's counsel and absence of defendant through illness of his mother is made the basis of the application for relief.—*S. C. Herbst Imp. Co. v. Hogan*, 384.
6. Where several parties are sued as assignees for the benefit of creditors and a partnership is alleged to exist between them, and it appeared from the findings that the assignment was not to the firm but to one of the partners individually, a judgment may be properly entered against the individual partner and the action dismissed as to the others, under sections 239 and 240, First Division of the Compiled Statutes, allowing judgment against one or more of several defendants. (*Comanche Mining Company v. Rumley*, 1 Mont. 201; *Wells v. Clarkson*, 5 Mont. 236, cited.)—*Knatz v. Wise*, 555.
7. The refusal of the district court to open a default was not an abuse of discretion where it appeared, that while appellant was not served with summons and her son-in-law and agent who had employed counsel to represent her, made affidavit that he had done so without her knowledge and consent, she had sought both in the trial court and on appeal, to take advantage of whatever benefit might accrue from the filing of a demurrer by her counsel while at the same time repudiating his authority to represent her, and it did not appear when she first had knowledge of such unauthorized appearance or of the default.—*Blaine v. Briscoe*, 582.

JURY.

Review of action of court in discharging, see CRIMINAL LAW, 6.

Erroneous refusal of challenge to juror, when not reversible error, see *EQUITY*, 1.
Challenge to juror, review of on appeal, see *NEW TRIAL*, 15.

JUSTICE OF THE PEACE.

Collection of illegal fees by, see *OFFICERS*, 1, 2.

An order made by a justice of the peace granting a new trial upon a motion therefor made more than ten days after the entry of judgment, although the notice of such motion was given within the statutory period, is an excess of jurisdiction and will be annulled by *certiorari*. (*Wallace v. Lewis*, 9 Mont. 309; *State v. Case*, 14 Mont. 520, cited.)—*State ex rel. Vocovich v. Volaw*, 308.

LEGISLATURE.

Interest in state contract by member of, see *STATE FURNISHING BOARD*, 3.

LIBEL.

In an action for libel, the good reputation of the plaintiff being alleged and denied, the mere fact that there was no evidence contradicting plaintiff's proof of a good reputation would not alone entitle him to a verdict where the defendant denied the publication of the libel and also pleaded justification.—*Authier v. Bennett Bros. Co.*, 110.

LOCATION NOTICE.

Verification of, see *MINES AND MINING*, 10, 11, 12, 14, 15.

MANDAMUS.

To compel state contract to be awarded to a particular bidder, see *STATE FURNISHING BOARD*, 1, 2.

To compel payment of judgment against county, 1.

A writ of mandamus, commanding the district court to hear testimony or proofs in support of an application for the appointment of a receiver in an action to foreclose a mortgage, in which issue was joined as to the sufficiency of the property to discharge the mortgage debt, will be dismissed on demurrer, where the answer to the writ set forth that at the time of the hearing the application no reasons were given why a receiver should be so appointed, except that it was alleged in the complaint that "the condition of the mortgage had not been performed," and that "the property was probably not sufficient to discharge said mortgage debt;" that ample opportunity was given plaintiff to present any other reasons, but none were presented to the court nor any offer of proof or witnesses made, the plaintiff relying solely upon the pleadings.—*State ex rel. Mutual Benefit L. I. Co. v. First Judicial District Court*, 274.

MASTER AND SERVANT.

Degree of care required of employer, see *NEGLIGENCE*, 3, 4, 5, 6.

MECHANIC'S LIEN.

1. An action against a property owner and a contractor was brought to enforce a mechanic's lien for material furnished the latter under a certain agreement, in which action the jury returned special findings of fact as follows: 1. The contractor was to notify the plaintiff into which particular contract he was to put the material sold at any particular time; 2. The contractor had the right, under the contract, to furnish the material himself, or buy it elsewhere than from the plaintiff; 5. That each day's order made by the contractor on the plaintiff was due when the material was delivered; 6. That each day's order made by the contractor upon the plaintiff was not a separate and independent contract from the orders made upon every other day; 7. That the plaintiff furnished the material without any specific agreement as to the

amount which was to be furnished; 8. That there was an understanding that the material should be furnished by the plaintiff whenever required; and 9. That there was a running account between the contractor and the plaintiff under which the orders were filled. *Held*, that the delivery of the materials was under one contract, regardless of the fact that they were delivered upon different days, and that the delivery dated from the day of the last item delivered.—*Helena Steam Heating & Supply Co. v. Wells*, 65.

2. Whether the materials in such cases were delivered under an entire contract or under separate ones, and whether there was a running account between the parties under which the orders were filled, are questions of fact for the jury.—*Id.*
3. Where materials are delivered under separate and distinct contracts, the lien of the mechanic should be filed within the time prescribed by the statute after the delivery under each of such contracts. But when the question has been submitted to a jury, and they find that the materials were delivered under one entire contract, and not under separate ones, and the court adopts such finding, and renders judgment in accordance therewith, it must be presumed that such question was properly submitted, that there was sufficient evidence to support such finding, and that the judgment is supported thereby.—*Id.*
4. A statute taxing a reasonable attorney's fees as costs to the defendant against whose property a lien is filed, where judgment is rendered for the plaintiff in foreclosure, is constitutional. (*Wortman v. Kleinschmidt*, 12 Mont. 316, followed. *DE WITT, J.*, dissenting).—*Id.*
5. Under section 1391, Fifth Division of the Compiled Statutes, providing that "all persons furnishing things or doing work as provided for by this Chapter, shall be considered subcontractors," the lien given to contractors by the mechanics' lien law of this state, (Compiled Statutes, 1887) extends also to subcontractors to the third, or any degree. (*Merrigan v. English*, 9 Mont. 118, approved.)—*Duignan v. Montana Club*, 189.
6. Under the mechanics' lien law of this state (Compiled Statutes, 1887) the burden is upon the owner to protect himself from the liens of subcontractors with whom he has no direct contractual relations, which may be done by withholding from the contractor such part of the contract price as will protect the property from liens for work or material until the time for filing such liens has expired, or by taking indemnity against such liens.—*Id.*
7. A complaint in a lien for foreclosure which does not allege that the materials furnished were used in the building, but which states that the material was furnished to be used in the building, and the notice of lien, which is made a part of the complaint, sets forth the fact that the material was used in the construction of the building, is sufficient on appeal where no objection to the form of the pleading was made in that court. (*Hershfield v. Aiken*, 3 Mont. 442; *Murphy v. Phelps*, 12 Mont. 581, cited).—*Id.*
8. In a suit by a subcontractor to foreclose a lien, failure to make the original contractor defendant is not a defect which can be raised for the first time on appeal. (*Parchen v. Peck*, 2 Mont. 571, cited).—*Id.*
9. When plaintiff, in an action to foreclose a mechanics' lien, alleged a contract with the defendant for the work sued for, but proved a contract with another person not a party to the action and between whom and defendant no agency existed, a non-suit should have been granted.—*Gilliam v. Black*, 217.
10. In an action to foreclose a mechanics' lien the party with whom the plaintiff contracted is a necessary party to the suit and the only party against whom the plaintiff is entitled to a personal judgment. (*Duignan v. Montana Club*, ante, page 189, cited).—*Id.*

MINES AND MINING.

Action by miner for personal injuries. see NEGLIGENCE, 13, 14, 15, 16.

1. Where, in ejectment to recover mining property, there was clear and substantial evidence to support the findings of the jury that there were no veins or lodes known to exist within the boundaries of plaintiff's placer claim at the time of applications for patents therefor, such findings will not be disturbed because of a conflict in the evidence.—*Butte & Boston Mtn. Co. v. Sloan*, 97.

2. Where the jury found that no veins or lodes were known to exist upon patented placer ground at the time of application for patent therefor, the discovery, subsequent to the trial, that a lode claim had been located upon the ground in controversy long prior to the applications for patent, and notice thereof recorded, would not justify a new trial upon the ground of newly discovered evidence, since the mere recorded evidence of a claim of discovery could not overcome the finding that no veins or lodes were known to exist.—*Id.*
3. In ejectment, where plaintiffs claimed under placer patents, the introduction of the patents in evidence conclusively establishes, as against the defendants, the fact that the ground was placer.—*Id.*
4. In an adverse suit to determine the right to the possession of mining property, a finding by the jury that the plaintiff did not discover a lead on the disputed premises on September 15, 1890, with at least one well defined wall and containing valuable deposits of silver, lead and manganese, will be set aside as contrary to the evidence where there was uncontradicted testimony by plaintiffs that they had sunk a shaft on the ground to a depth of from forty to fifty feet, and, on that date, had discovered a lead about fourteen inches wide in the bottom of the shaft, which contained manganese and quartz and carried silver, lead and iron, that there was a foot wall and that they afterwards sunk four feet in the clear on the lead, there being further testimony by a miner who entered the shaft in the following April that he saw the wall on each side of the lead; that the vein contained manganese and quartz and that the indications were sufficient to justify further work in exploring it.—*Walsh v. Mueller*, 180.
5. An instruction in an adverse suit which, after defining the dimensions and course of a lawful location, charges, in effect, that if plaintiffs with knowledge of the direction of their vein, fraudulently located their claim in disregard thereof for the purpose of appropriating surface ground to which they would not have been entitled had they located their claim along the line of the vein, then, even though their location was in other respects sufficient, this fact would render the location void is reversible error, where no evidence of any such fraudulent purpose was introduced nor would have been admissible under the pleadings.—*Id.*
6. In an action to quiet title to a mining claim where plaintiffs sought to prove the performance of one hundred dollars worth of labor on the claim, as required by section 2324, United States Revised Statutes, before defendant's relocation, a finding of the jury under defendant's testimony that the value of such work was but seventy-five dollars, will not be disturbed on appeal where plaintiffs barely proved the performance of the required work, if at all, under the best view of their own testimony.—*Hircher v. McKendricks*, 211.
7. When the expense of sharpening picks used in representing a mining claim is sought to be proved as an item toward making up the required one hundred dollars worth of labor or improvements, the exclusion of the evidence is proper where counsel refused to inform the court, though requested to do so, as to whether he wished to show that the picks had been sharpened on the premises or before they were taken there.—*Id.*
8. Where work is resumed upon a mining claim to preserve the same from forfeiture for failure to represent, it should be prosecuted with reasonable diligence until the requirements for annual labor and improvements have been obeyed. (*Honaker v. Martin*, 11 Mont. 91, followed.)—*Id.*
9. The resumption of work by plaintiffs upon a mining claim, before a relocation, for the purpose of preventing a forfeiture for failure to represent, as permitted by section 2324, Revised Statutes of the United States, cannot be held to have been prosecuted with due diligence, where it appeared that fifteen days prior to relocation by defendant, plaintiffs had, without any apparent reason, and without having completed the requisite one hundred dollars worth of labor or improvements, ceased all work upon the claim; that after the last work had been done they posted a notice soliciting proposals for five hundred dollars worth of work, but it did not appear, however, whether the notice was posted before or after defendant's relocation.—*Id.*
10. It is within the power of the state legislature to enact that the notice of location of a mining claim shall be on oath, as required by section 1477, Fifth Division of the

Compiled Statutes. (Doubted in *Wenner v. McNulty*, 7 Mont. 30; but fully affirmed in *O'Donnell v. Glenn*, 3 Mont. 248, which ruling is followed as the law of the case in *O'Donnell v. Glenn*, 9 Mont. 452, and was followed as *stare decisis* in *Prescott v. Metcalf*, 10 Mont. 284.)—*McCowan v. MacLay*, 234.

11. Under section 1477, Fifth Division of the Compiled Statutes, requiring any person who discovers a mining claim to make and file a declaratory statement, on oath, of such discovery or location, describing the claim in the manner provided by the laws of the United States, the declaratory statement must be of the discovery or location, as well as of the description of the claim, and where an affidavit states merely that "the description of said lode," as given in the notice, "is true and correct," this is a verification as to one item only, and the location notice is fatally defective. (*Metcalf v. Prescott*, 10 Mont. 284, cited.)—*Id.*
12. The statement in a verification of a location notice, that the locators "have in every respect fully complied with the requirements of Chapter 6, of Title 22 of the Revised Statutes of the United States, and the local customs and laws regulating mining locations," is simply a conclusion of law, and not a verification of any fact.—*Id.*
13. The words "in the absence of any adverse claim" as used in section 2332 of the Revised Statutes of the United States, providing that evidence of the possession and working of a mining claim for a period equal to the time prescribed by the statute of limitations for mining claims of the state where the same is situated shall be sufficient to establish a right to a patent thereto, in the absence of any adverse claim, mean an adverse claim filed in the land office within sixty days, as required by section 2325, *Id.*, in opposition to an application for a patent to mining premises made by another person in such office, and do not mean an adverse claim filed within the statute of limitations. It being the purpose of the statute to prevent an applicant for a patent from failing to obtain his patent simply for defects in his claim where he had been in undisputed possession for the period of the statute of limitations, and no one appeared in the land office to adverse his application.—*Id.*
14. An affidavit to the declaratory statement of a quartz location, which shows that the statement was sworn to one year before the location of the lode, is fatal to the validity of the location in the absence of proof that the affidavit was wrongly dated by mistake of the notary.—*Berg v. Koegel*, 286.
15. The case of *McCowan v. MacLay*, *ante*, page 234, holding that section 1477, Fifth Division, Compiled Statutes, requiring declaratory statements of quartz locations to be made on oath, is not in conflict with the laws of the United States upon the subject of mining claims, affirmed.—*Id.*

MORTGAGES.

Under section 358 of the Code of Civil Procedure, authorizing the entry of deficiency judgments in actions for the foreclosure of mortgages, a deficiency judgment may be properly entered against the grantor in a deed of trust given to secure the payment of a promissory note, though there may be nothing in the terms of the deed itself to warrant the entry of a judgment for a deficiency.—*First National Bank of Butte v. Pardee*, 290.

MUNICIPAL CORPORATIONS.

Action against, to recover taxes paid under protest, see TAXATION, § 1, 2.

In the case at bar, the plaintiff sought to restrain a city from carrying out a contract for the paving of a street on the ground that it would create such an increased indebtedness of the city as is prohibited by section 8, Article XIII, of the state constitution. The defendants in their answer alleged that the cost of paving under the contract was payable out of a specific fund assessed against the land abutting on the street to be paved and did not constitute an indebtedness or liability of the city. *Held*, that it was incumbent upon the defendants to show that proper steps had been taken to assess the abutting property with the cost of the improvement, and that the contractor had expressly agreed to accept the fund thus raised by such special assessment and expressly waived all right to hold the city in any way liable under the contract in question.—*Atkinson v. City of Great Falls*, 372.

NEGLIGENCE.

1. In actions for damages for personal injuries, contributory negligence is a matter of defense, and the absence of contributory negligence is not required to be proved by the plaintiff as part of his case. (*Higley v. Gilmer*, 3 Mont. 97, cited.)—*Nelson v. City of Helena*, 19.
2. A corollary to the rule that the plaintiff in an action for personal injuries need not prove the absence of contributory negligence is to the effect that, whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proof is immediately upon him. (*Kenyon v. Gilmer*, 4 Mont. 433; *Wall v. Helena Street Ry. Co.*, 12 Mont. 44, cited.)—*Id.*
3. In defining "ordinary care" the courts recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised.—*Johnson v. Boston & Montana C. C. & S. Mining Co.*, 164.
4. The care and attention required on the part of an employer in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as for good.—*Id.*
5. In the case at bar the defendant, acting upon the opinion of an experienced engineer as to its capacity, had an old steam boiler, in bad condition, repaired, so that it could be made to answer for temporary purposes in pumping water, where about sixty pounds pressure would suffice, and the boiler was used for such purposes for about six months. It was afterwards placed in the concentrating works of the defendant and connected with the same steam pipe with which larger and stronger boilers were connected, and this was done by the defendant's engineer, who knew of the bad condition of the boiler and that it was not fit to carry more steam than seventy pounds as a maximum pressure. A test of the boiler was made before it was fired, primarily, to see if it leaked and the test was made with only one guage. The plaintiff's intestate was in the employ of the defendants as a boss carpenter, and while in the boiler room in the discharge of his duty, the boiler in question exploded, resulting in his death. *Held*, that the boiler was not such a reasonably safe appliance as the defendant ought to have furnished for use in its works where its employees were exposed, and that the plaintiff was entitled to recover.—*Id.*
6. In an action for damages for the death of an employee caused by the explosion of a steam boiler, an instruction that the defendant "is required to supply its employees with safe and suitable machinery." is not misleading and erroneous, where this rule is qualified by further instructions in the charge, that the defendant is not liable if a defect in the boiler causing the explosion was "latent,—that is, if it could not be discovered by ordinary care on the part of the defendant," and that in providing machinery for the use of his servants the master does not warrant the safety of such machinery, or is he required to see that such machinery is absolutely safe, and "In this case, if defendant furnished such a boiler as a reasonably prudent man would furnish, the plaintiff cannot recover, and your verdict should be for the defendant." (*Kenyon v. Gilmer*, 5 Mont. 267, cited.)—*Id.*
7. Failure of a person living on a stream below a dam, and having knowledge of its dangerous condition, to institute proceedings to have the dam judiciously examined and made secure or removed, as authorized by the provisions of chapter 56, Fifth Division of the Compiled Statutes, does not constitute contributory negligence so as to defeat his right to recover for damages resulting from the subsequent breaking of the dam.—*Hollenback v. Dingwell*, 436.
8. In an action for damages resulting from an overflow of the plaintiff's land, caused by a jam in negligently floating logs down a stream, it appeared from the testimony of the plaintiff that the jam extended partially across the stream and was throwing the water over the banks of the stream upon his land. He further testified that below the jam the water was within the banks and that the swales and sloughs below the jam were dry, and that ordinarily in high water these sloughs would fill up before the water went over the banks. He also testified that the defendant had only one man looking after the jams on the stream on the day in question and that the water stood over his ranch at the maximum depth for about thirty-six hours. It further appeared

from the evidence that the water was high at the time of the jam, occasioned by an unusually heavy rain in the mountains; that the floating and rolling of the logs carried on the plaintiff's land was the cause of the injury complained of, and that in the following year the water was as high, but the defendant while driving his logs had men stationed along the drive to break the jams and no overflow occurred to the injury of ranchmen on the stream. *Held*, that the evidence was sufficient to sustain a finding that the plaintiff's land was flooded through the defendant's negligence. (*Hopkins v. Butte & Montana Com. Co.*, 13 Mont. 223, cited.)—*Hopkins v. Butte & Montana Com. Co.*, 356.

9. In an action for damages for injury to crops caused by the overflow of the plaintiff's land in negligently floating logs down a stream, the value of the crops, the expense of maturing them and of reaping, threshing and moving to market may be shown, in order to fix the amount of damages. (*Carron v. Wood*, 10 Mont. 500, cited.)—*Id.*
10. In an action for damages resulting from the overflow of land, caused by negligently driving logs in a stream, evidence that a mare and colt were in the pasture when the overflow came, that the water was from two to fifteen feet deep and that nothing was again seen of the mare and colt, sufficiently warrants the finding that these animals were lost in the flood from the overflow.—*Id.*
11. In an action for overflowing land, resulting from the negligence of the defendant in driving logs whereby a log jam formed in a stream, evidence showing the method of operating adopted by the defendant in allowing jams to form and in breaking them by precipitating other jams upon them, instead of releasing them as they formed, is competent and admissible.—*Id.*
12. In an action for damages for the breaking of defendant's irrigating ditch it is error to instruct the jury that "it is incumbent upon the defendant company to construct its flumes and ditch in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch," for thereby the defendant is not only held to the highest degree of care, but is made an insurer against all damages without regard to the question of negligence.—*King v. The Miles City Irrigating D. Co.*, 463.
13. It is the duty of the employer to use all reasonable means to provide a safe place in which the employe may perform his service, and therefore, a miner engaged in driving a tunnel, whose work is confined to drilling and blasting from its face, while assuming the risk naturally attendant upon such work, does not assume the risk of the failure of his employer to use reasonable precautions to prevent the roof of that part of the tunnel already created from caving upon him, or failure to keep the floor of the tunnel so free from debris as not to obstruct his escape in case of accident.—*Kelley v. The Fourth of July Min. Co.*, 484.
14. A miner engaged in drilling and blasting in the face of a tunnel and who did not understand timbering a mine, is not guilty of contributory negligence in remaining at work in the tunnel where it appeared that the day before the caving in of the roof of the tunnel by which he was injured, he had assisted in putting in a stull under it by direction of the foreman, and that afterwards upon noticing the dirt falling from the roof, he asked the foreman, who was an experienced timberman, if it was safe and was assured that it was.—It being a disputed question as to whether the stull was properly placed in the mine, and whether, if properly put in, was sufficient to support the roof, and it not appearing that the danger of the mine caving at the time of the accident was obvious.—*Id.*
15. Nor would the miner in such case be guilty of contributory negligence in remaining at work when the danger of working in the tunnel was increased by reason of an accumulation of debris behind him which would obstruct escape in case of accident, where on the afternoon before the mine caved in, he requested the foreman to have the same removed and received his promise that it would be removed the following morning, since he would be justified in continuing at work for a sufficient time for the performance of such promise, notwithstanding the increased danger,—there being no obvious or immediate danger of the mine caving at the time, and the miner was relying upon the foreman's assurance of its safety. (*McAndrews v. Montana Union Railway Co.*, 15 Mont. 290, distinguished.)—*Id.*
16. A foreman for a mining company who has full control of the property, employes,

tools, materials and complete charge of the management and development of the mine, is a vice-principal of the corporation, and, when guilty of negligence in not sufficiently timbering a tunnel in which an employe was working and received his injuries, his negligence is the negligence of the corporation for which it must respond in damages.—*Id.*

NEGOTIABLE INSTRUMENTS.

1. In an action on a promissory note, it appeared that the note in suit was indorsed to the plaintiff, a church society, before maturity, and without notice of any defense thereto, the consideration of the transfer being the surrender of the indorser's individual note, which he had previously executed to the plaintiff as a subscription to aid in the erection of a new church building. *Held*, that the legal attitude of the plaintiff was simply that of any *bona fide* holder of commercial paper who acquired it before maturity, and in the usual course of business, without notice of anything impeaching its validity, and a recovery could be had against the maker of the note.—*Grace M. E. Church v. Rickards*, 70.
2. Notice of demand and non-payment is waived by the indorser of a note who, at the time of indorsing it, stated to the payee that he was to look to him and to no one else to pay the note and that he would pay it promptly, and on the last day of grace and at other times after maturity promised to pay it and asked not to be pressed.—*Quaintance v. Goodrow*, 376.
3. Where suit by the assignee of a promissory note, upon which was indorsed a credit in the month of December, 1883, would have been barred by limitation, if, as defendant contended, the credit should have been given in August, 1883, a general verdict for plaintiff is not inconsistent with a special finding of the jury that the credit should have been given in August but that the plaintiff bank did not receive the money until December, it appearing that the credit grew out of a private transaction between a member of the assignor bank and the defendant, in which the bank had no interest or concern.—*First National Bank of Butte v. Pardee*, 390.

NEW TRIAL.

Newly discovered evidence, as ground for, in ejectment to recover mining property, see MINES AND MINING, 2.

Granting of, by justice of the peace, see CERTIORARI, 1.

1. On motion for a new trial, in a case where the record is very voluminous, a specification of error which makes no pretense of pointing out, in any way, wherein the evidence was insufficient to establish the breach of a certain condition of the contract, but merely states that "the evidence clearly shows" that such condition had been performed, is inexcusably insufficient, and the court is justified in ignoring such specification. (*Thorpe v. Freed*, 1 Mont. 651; *First National Bank v. Roberts*, 9 Mont. 323, cited.)—*Zickler v. Deegan*, 198.
2. It was charged by the plaintiff in the action, that the defendants had carried away and secreted ores and had disposed of ores belonging to the plaintiff, and the verdict of the jury in this respect was for the plaintiff. In order to show that this action of the jury was against the evidence, the defendants, on motion for a new trial, specified as error, that the ores alleged to have been carried away were "replevied by plaintiff and by him converted to his own use and kept from the possession of the defendants," and "that the only ores disposed of by the defendants, and the moneys received therefor, have been fully accounted for to plaintiff." *Held*, that such specifications were properly ignored, as they failed to point out wherein the evidence was insufficient.—*Id.*
3. It was charged by the plaintiff that the defendants, while operating the plaintiff's mine under a lease, had attempted to relocate the mine for their own benefit, and the jury so found for the plaintiff. On motion for a new trial, the defendants' specification of error was, "that defendants' partial acts of location, complained of by plaintiff, were performed for his benefit, and for the purpose of protecting their leasehold rights, and were not performed for the purpose of setting up in themselves a title adverse to plaintiff's title, if any title he had." *Held*, that this specification was properly

ignored, as it made no pretense of pointing out the insufficiency of the evidence to sustain the finding of the jury.—*Id.*

4. In an action against the defendant as lessee of a mine for failure to account for the profits thereof to the plaintiff, the claim of the defendant that the plaintiff acquiesced in the former's method of accounting cannot be urged as ground for a new trial, where no facts were pleaded showing any such acquiescence, so as to constitute a waiver.—*Id.*
5. Where an order is made staying execution for thirty days in which to prepare and file statement on motion for a new trial, but through an omission of the clerk the minutes merely show an order staying execution for thirty days, the record may be corrected to conform it to the truth, after the period of the stay has expired. (*Territory v. Clayton*, 8 Mont. 1, cited.)—*Kendall v. O'Neal*, 303.
6. It is error to admit parole evidence to vary the terms of a written contract, and, if admitted, the error is not corrected by an instruction to the jury to disregard it, if the verdict was in fact influenced thereby and a new trial should be granted notwithstanding such instruction. (*Fisher v. Briscoe*, 10 Mont. 124, cited.)—*Nelson v. Spears*, 351.
7. The plaintiff sued the defendant to recover a sum claimed to be due for hay and other personal property sold by him to the defendant. The latter in his answer denied the indebtedness and set up a counterclaim. It appeared that the respective parties were copartners in the sheep business and that this copartnership continued to do business for nearly a year when it was dissolved by a written agreement entered into between the parties. The plaintiff in his replication to the defendant's counterclaim, alleged an agreement to pay the defendant \$40 per month as a herder from and after the date of the dissolution of said copartnership, but the court instructed the jury that the plaintiff's replication alleged that under the agreement of dissolution "the defendant was to receive \$40 per month," from a date anterior to the partnership entered into between the parties. Held, that this instruction was a wrong interpretation of the plaintiff's replication, that it was misleading and therefore prejudicial to the plaintiff, and that a new trial should have been granted.—*Id.*
8. Where the error of the court upon which a reversal is ordered did not occur during the trial but arose in rendering a wrong judgment upon the facts as found and undisputed, a new trial is not necessary but the case will be remanded for the entry of a proper judgment. (*Woolman v. Garringer*, 2 Mont. 405; *Collier v. Irvine*, *Id.* 557; *Barkley v. Tell*, *Id.* 435; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Stackpole v. Hallahan*, *ante*, page 40, cited.)—*Kimpton v. Jubilee Placer Mining Co.*, 379.
9. In an action for a breach of warranty of the quality of paint sold, the granting of a new trial after verdict for defendant was proper where it appeared that the paint, shortly after being put on certain roofs, curled up, cracked and blew off; that the roofs were dry and in proper condition to receive the paint; that it was properly put on, and that good paint when properly put on a roof in suitable condition to receive it would not curl up or blow off.—*Michaud v. Freischelmer*, 472.
10. The admission, on the trial of a suit in equity to have an assignment declared fraudulent, of a conversation between the plaintiff and one of the defendant assignors, occurring after the assignment had been made, in which the latter stated that they had hoped to borrow money and make a settlement with their creditors, but were prevented by plaintiff's action, if error, was not of such a prejudicial nature as to warrant a reversal of the case.—*Merchants' National Bank v. Greenwood*, 326.
11. Appeals are matters of statutory regulation, with which there must be a substantial compliance in order to confer jurisdiction, and therefore, a notice of intention to move for a new trial which fails to specify the particular errors relied upon as required by section 556, Third Division of the Compiled Statutes, is insufficient, and a writted motion for new trial, specifying the errors relied upon, served and filed contemporaneously with the notice, cannot be construed as a notice of intention to move, so as to cure the defect. (*State v. Fry*, 10 Mont. 407; *Courtright v. Perkins*, 2 Mont. 404; *Territory v. Hanna*, 5 Mont. 247; *State v. Gibbs*, 10 Mont. 210; *State v. Northrup*, 18 Mont. 534, cited.)—*State v. Whaley*, 574.
12. The absence of a proper notice of intention to move for a new trial is not cured by a stipulation to the effect that the bill of exceptions and papers considered by the court

and used on motion for a new trial, be settled, allowed and considered as a bill of exceptions on appeal.—*Id.*

13. Failure of a notice of intention to move for a new trial to specify the particular errors relied upon is not waived by a motion to strike it out upon other grounds. (*Gregg v. Garrett*, 18 Mont. 18, cited.)—*Id.*
14. While an order denying a new trial is an intermediate order or decision within section 394, Third Division of the Compiled Statutes, so as to entitle it to be reviewed on an appeal from the judgment, the errors enumerated in section 354, *Id.*, as grounds for a new trial must be first called to the attention of the district court on motion for new trial in order that the trial court may have an opportunity to correct its own errors.—*Id.*
15. Under section 354, Third Division of the Compiled Statutes, providing that a new trial may be granted when there has been any abuse of discretion, alleged errors in denying a change of venue and in overruling challenges to jurors will not be reviewed by the appellate court without a motion for a new trial having been made.—*Id.*

NON SUIT.

When plaintiff, in an action to foreclose a mechanics' lien, alleged a contract with the defendant for the work sued for, but proved a contract with another person not a party to the action and between whom and defendant no agency existed, a non-suit should have been granted.—*Gilliam v. Black*, 217.

OFFICERS.

1. A justice of the peace collecting excessive fees is liable in an action for the statutory penalty without regard to any corrupt motive or intent in collecting them. His ignorance that the fees were illegal does not excuse him. Neither would the fact that the person paying the fees knew that they were excessive and kept silent, nor the fact that upon discovery of the mistake he tendered back the fees, constitute any defense to the action.—*Leggatt v. Prideaux*, 205.
2. Where the statute in such case imposes the penalty for receiving the illegal fees, the question as to whether payment by the litigant was voluntary or not, is immaterial.—*Id.*
3. A county surveyor is not entitled to an allowance from the county for his reasonable expenses, in making a survey, as for hire and board of team, since under section 900, Fifth Division of the Compiled Statutes, the compensation of the county surveyor is fixed at seven dollars per day while making a survey, no provision being made for expenses, as is the case with many other county and state officers.—*Wight v. Commissioners of Meagher County*, 479.

PARTIES.

Defendant, non joinder, in lien foreclosure, see MECHANICS' LIEN, 8.

Defendant, necessary, in lien foreclosure, see MECHANICS' LIEN, 10.

A defense does not abate by the death of a defendant after the commencement of an action although there had been no service of summons, but survives under section 22 of the Code of Civil Procedure, and may be maintained by his representatives.—*Lavell v. Frost*, 93.

PARTNERSHIP.

A partner withdrawing from a firm must, in order to exempt himself from subsequent liability to one who had previously dealt with the firm on the strength of such partner being a member, cause notice of the dissolution to be brought home to such person directly, or it must appear that the facts came to his knowledge in such a way as to give reason to believe that a dissolution had taken place.—*Farwell v. Cashman*, 398.

PHYSICIANS AND SURGEONS.

Evidence of usage among, when admissible, see EVIDENCE, 3.

PLEADING.

1. The denial on information and belief of a material fact not presumptively within the knowledge of the pleader, is sufficient to present an issue, under section 89, Code of Civil Procedure, providing that the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant.—*Lewis v. Weyerhorst*, 287.
2. Where an answer alleges fraud, and contains other allegations which are absolutely contradictory of and inconsistent with the allegation of fraud, such allegations are properly stricken out.—*State ex rel. Northwestern Nat. Bank v. Dickerman*, 278.
3. A complaint in replevin which alleges in one count that goods of which defendant obtained the delivery by false representations were transferred to certain co-defendants as an assignment for benefit of creditors and in another count that the transfer was made in payment of a debt due by defendant to one of said co-defendants, is demurrable as uncertain and ambiguous, since it cannot be determined therefrom upon which of these contradictory allegations plaintiffs rely.—*Reed v. Poindexter*, 294.
4. Where a demurrer to a complaint which sets up a cause of action in two contradictory counts is sustained for uncertainty and ambiguity, the trial court is not required to determine whether either or both of the statements of plaintiffs' causes of action were correct.—*Id.*
5. Where, in an action to recover money advanced and due on stock purchased for the defendant, the defendant, for an answer, sets up a counterclaim, alleging that the plaintiff should have sold the stock at a certain price, and neglected to do so, which allegation the plaintiff denies, these pleadings raise a material issue, upon which the defendant assumes the burden of proof.—*Coquard v. Weinstein*, 312.
6. Averments in a complaint that the defendants have not paid any part of the sums demanded; that they have been often requested so to do, but have wholly refused to pay the same, to the unreasonable and vexatious delay of the plaintiff, are sufficient to sustain a judgment for interest.—*Burns v. Paulsen*, 333.
7. A complaint for the purchase price of goods, which neither pleads any indebtedness by the defendant to plaintiff, or to any one else, nor that the goods were delivered to defendant by plaintiff or by any one in plaintiff's behalf, or by any one else, is bad on demurrer.—*S. C. Herbst Imp. Co. v. Hogan*, 334.
8. Legal capacity to sue being an ordinary incident to a corporation, a demurrer for such want of capacity must be based upon allegations appearing in the pleading and not upon the want of allegations.—*Id.*
9. A complaint alleging an indebtedness by the defendant to a certain company upon a balance of an account for goods sold and delivered to defendant in a given month, and the assignment of the account to plaintiff, who is the owner and holder thereof, and that the defendant has not paid said account or any part, though due and payable, is good on general demurrer.—*Id.*
10. Demurrer is the appropriate remedy to reach a pleading objectionable for uncertainty.—*Id.*
11. A complaint on an account assigned to plaintiff by a certain company which fails to show that such company had any legal existence or the nature thereof, is bad when specially demurred to on that ground.—*Id.*

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENT.

RAILROADS.

Exercise of eminent domain by, see EMINENT DOMAIN.

RECEIVER.

Order refusing to appoint, not appealable.—*Cotter v. Cotter*, 63.

1. A receiver in charge of property in litigation is to be regarded as the officer of the court which appointed him. He stands as an indifferent person, clothed with the power of receiving and preserving the assets involved in the suit wherein he was ap

- pointed, for the benefit of whoever may finally be declared to be entitled to them. (*Stebbins v. Savage*, 5 Mont. 253, cited.)—*Gardner v. Caldwell*, 221.
2. Where, in an equitable action, a receiver has been appointed, *pendente lite*, by a court of competent jurisdiction, to take charge of the property and affairs, including rights of way, franchises and assets of a corporation, and has taken charge and is in possession of all such property, a judgment creditor of the corporation, who instituted his action and obtained his judgment in a court of co-ordinate jurisdiction in another district of the state, subsequent to the appointment of such receiver, and subsequent to the taking of possession by such receiver, may be restrained by injunction from levying an execution upon the property of the corporation in the hands of the receiver, or upon any interest that such corporation may have in such property in the receiver's hands.—*Id.*
 3. A writ of mandamus, commanding the district court to hear testimony or proof in support of an application for the appointment of a receiver in an action to foreclose a mortgage, in which issue was joined as to the sufficiency of the property to discharge the mortgage debt, will be dismissed on demurrer, where the answer to the writ set forth that at the time of the hearing the application no reasons were given why a receiver should be appointed, except that it was alleged in the complaint that "the condition of the mortgage had not been performed," and that "the property was probably not sufficient to discharge said mortgage debt;" that ample opportunity was given plaintiff to present any other reasons, but none were presented to the court nor any offer of proof or witnesses made, the plaintiff relying solely upon the pleadings.—*Stite ex rel. Mutual Benefit L. I. Co. v. First Jud. Dist. Court*, 274.

REHEARING.

Motion for, when denied, see APPEAL, 21.

REPLEVIN.

See CLAIM AND DELIVERY.

RES JUDICATA.

Where a motion to retax costs is denied and the judgment is not appealed from, the question of the legality of such costs is *res judicata* in an action on a bond conditioned for the payment of the judgment of which such costs were a part.—*Nelson v. Donovan*, 85.

RULES OF SUPREME COURT.

See *ante*, page 589.

SALES.

In an action for damages for a breach of contract for the purchase of oats, where a prompt delivery was required, a finding that the oats were not delivered within a reasonable time is supported by evidence that two car loads were shipped to defendants by a circuitous route and that the other car load, while shipped by a direct route, was consigned to other parties, defendants having no knowledge of its arrival until after they were obliged to buy elsewhere.—*Watkins v. Morris*, 309.

SCHOOLS.

1. Section 1951, Fifth Division of the Compiled Statutes, provides that when bonds are issued by a school district, "they shall bear the signature of the chairman of the board of trustees, and shall be countersigned by the clerk," and when a warrant in such form is drawn by the board of trustees of a school district on the county treasurer, it is sufficient as to form.—*State ex rel. Northwestern National Bank v. Dickerman*, 278.
2. Although the trustees of a school district exceed their authority in contracting for a loan on bonds of the district, yet, if the money is advanced under the contract in good faith and is used for school purposes the district is under a liability to refund the money so advanced and expended.—*Id.*

3. Section 3, Article XIII, of the State Constitution, providing that all moneys borrowed by any municipality, or other subdivision of the state, "shall be used only for the purpose specified in the law authorizing the loan," is not violated by the act of February 18, 1895, which provides that money loaned or advanced for school purposes on bonds of the district which are afterwards declared to be void by the supreme court of the state, may be repaid from the proceeds of the sale of subsequent bonds issued for school purposes. Nor is such act retrospective in its operation, and therefore within the inhibition of section 13, Article XV, of the constitution, providing that the legislature shall pass no law retrospective in its operation or which imposes upon the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past.—*Id.*

STATE CONTRACTS.

Awarding of, see STATE FURNISHING BOARD, 1, 2.

Interest in, by member of legislature, see STATE FURNISHING BOARD, 3.

STATE FURNISHING BOARD.

1. The term "responsible" as used in the phrase "lowest responsible bidder" does not refer to pecuniary responsibility only, but includes, judgment, skill, ability, capacity and integrity, and therefore, officers intrusted with the duty of awarding a contract to the lowest responsible bidder must exercise official discretion in determining the question and cannot be compelled by mandamus to award a contract to a particular bidder merely because he has offered the lowest bid and tendered a sufficient bond.—*State ex rel. Hayes v. Richards*, 145.
2. The rejection by the state furnishing board of a bid for the publication of the Montana Codes, although the lowest and accompanied by an offer of adequate security, was not a wrongful or arbitrary exercise of discretion where it appeared that the bidders discussed and explained their bids exhaustively to the board and their capacity to perform the work; that the board acted with deliberation and took adjournments to make further inquiries and, after considering all the facts and information which they could reasonably be expected to obtain, determined that the unsuccessful bidder had not the facilities to perform the work.—*Id.*
3. Awarding a contract for state printing to a publishing company whose business manager was, at the time, a member of the state legislature, but who received a fixed salary for his services and had no interest in the profits of the company, does not violate § 30, article V, of the Constitution, providing that no member of any department of the government shall in any way be interested in such contract.—*Id.*

STATUTE OF FRAUDS.

Where a creditor by written order requests his debtor to pay the amount of his debt to a third person, the oral acceptance of such order is not within the statute of frauds as constituting a promise to pay the debt of another. An agreement by such third person not to file a lien upon the debtor's premises would be a good consideration for such acceptance.—*Lavell v. Frost*, 93.

STATUTE OF LIMITATIONS.

May be pleaded after vacation of default judgment, see JUDGMENTS, 2.

Working of mining claim for period of, see MINES AND MINING, 12.

STATUTES.

Construction of election, see ELECTIONS, 1, 2.

As a general rule, by the adoption of a statute of a foreign country, the subject of which is new to this jurisdiction, the construction given to such statute by the courts of such foreign country is impliedly adopted, provided our own statute, as enacted, is silent as to the matter of construction. (*Lindley v. Davis*, 6 Mont. 453; *Territory v. Stears*,

2 Mont. 330; *First National Bank v. Bell etc. Mining Co.*, 8 Mont. 32, cited.)—*Stackpole v. Hallahan*, 40.

SUPREME COURT.

Rules of, 539.

SURETIES.

A demand is not necessary before bringing action against a judgment debtor and his sureties on a bond given to stay execution and conditioned that the obligor would pay the judgment. (*Lomme v. Sweeney*, 1 Mont. 534; *Hoskins v. White*, 13 Mont. 10; *State v. Bleeman*, 12 Mont. 13, cited.)—*Nelson v. Donovan*, 35.

TAXATION.

1. Assumpsit cannot be maintained to recover money paid to a city for a special assessment for sewer tax, alleged to be illegal, where such payment is made to the city treasurer before the penalty for nonpayment is assessed or due, though plaintiffs stated at the time that it was paid under protest and that suit would be brought to recover it back.—*Hopkins v. City of Butte*, 108.
2. Where the inhabitant of a city whose property has been illegally assessed pays the demand with a full knowledge of all the facts which rendered such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention or to prevent its immediate seizure, such payment must be deemed voluntary; and the filing of a written protest at the time of making payment does not make the payment involuntary.—*Id.*
3. The law looks with disfavor upon suits to recover back taxes which are paid under a protest prompted by dissatisfaction and unwillingness to pay, rather than by compulsion to prevent the immediate execution of a levy or seizure.—*Id.*
4. The revenue act of 1891 (Second Session, page 75, § 5) requires property to be assessed at its full cash value, and therefore, where a taxpayer returns to the assessor a list of property, from the total and apparent cash valuation of which he appears to have deducted one-third, the assessment of the property by the assessor in accordance with such total valuation is not an increase of the assessment list, nor would the taxpayer be entitled to notice that the assessor had not assessed the property at one-third less than its cash value, as returned, but had assessed it in the only manner permitted by law.—*First National Bank of Missoula v. Batley*, 135.
5. An assessment is completed when the persons and property to be taxed have been listed and the sums which are to constitute the basis of an apportionment have been estimated.—*State ex rel. City of Butte v. Johnson*, 570.
6. Under a statute (Political Code, §§ 4-72, 4362) requiring city councils, on the second Monday in August of each year, to determine by resolution the amount of city taxes to be levied and assessed by the city for the current year, and making the county assessment the basis of taxation, the assessment of property in a city is not completed until the date of the resolution of the city council fixing and levying the amount of taxes to be levied and assessed for such year.—*Id.*
7. Where the assessment of property in a city was not completed until the second Monday of August, 1895, the assessment is not within § 4017 of the Political Code (adopted July 1, 1895), providing that all taxes assessed before that code took effect must be collected under the laws in force at the time the assessment was made, and therefore it is the duty of the city treasurer, and not of the county clerk, to extend the city taxes on the county tax list, as provided by §§ 4367, 4368, 4372 of the Political Code.—*Id.*

TELEGRAPH.

Instructions by, ambiguity in, see AGENCY, 1, 2.

TOWNSITES.

Easement in streets and alleys of, see EASEMENT AND SERVITUDE, 1.
Possession of land platted as part of, see TRESPASS, 1.

TRESPASS.

Where plaintiff in trespass had sold the land, but was remaining in possession by permission of his grantee, a townsale company which had regularly platted it as part of a townsite, his possession is sufficient to maintain the action as against a naked trespasser who enters without claim or color of title.—*Sell v. Graves*, 312.

TRUSTEES.

Of corporation, liability for failure to file annual report, see CORPORATIONS, 1, 2.

ULTRA VIRES.

Defense of, in prosecution for forgery of city warrant, see CRIMINAL LAW, 17.

VENDOR AND VENDEE.

Suit was brought against the occupants of certain land by persons claiming the ground under a quartz location. To resist the litigation the plaintiffs in the case at bar located the land for themselves and the other defendants in said suit, and agreed that in case said defendants were successful in defending the suit, said plaintiffs would convey to each of them who contributed his *pro rata* share towards the defense such portion of the land as the amount of money contributed should bear to the whole amount expended in defending the suit. The defense prevailed, but several of the owners of lots involved in the suit failed to pay their proportion of the expenses, and the said plaintiffs were obliged to pay, in excess of the amounts actually collected by the *pro rata* assessments, a deficiency of about five hundred dollars. One of the lot owners who had defaulted in his payment, and whose assessment amounted to about forty-one dollars, sold and conveyed his interest to the defendant in the case at bar, who, after ascertaining the right, title and interest of said plaintiffs in the lot, had a deed prepared by a notary, conveying the interest of these plaintiffs to himself, but no consideration was expressed in the deed. The defendant then directed the notary to take the deed to the plaintiffs, who fixed the consideration at two hundred dollars, and asked the notary to see the defendant and ascertain if that was satisfactory. The notary did so, and, after consulting the defendant informed the plaintiffs that the defendant wanted the deed, and did not care what consideration was inserted. The plaintiffs thereupon executed the deed with a consideration of two hundred dollars written therein, and the deed was delivered to the defendant. Held, that the plaintiffs had an equitable claim to be reimbursed for their expenditures, and, it being with a view to secure such reimbursement that they fixed upon the consideration so named in the deed, to which the defendant must be deemed to have assented, they were entitled to recover that amount.—*Thomas v. Frank*, 294.

VERDICT.

Form of, in claim and delivery, see CLAIM AND DELIVERY, 2.

WAGE WORKER'S LAW.

Where there is no evidence in the record and the findings of the court bring the plaintiff within the operation of section 2050, *et seq.*, Fifth Division of the Compiled Statutes, known as the "Wage Worker's Law," a judgment for plaintiff against an assignee for the benefit of creditors will be affirmed on the authority of *Flanders v. Murphy*, 10 Mont. 398 and *Marshall v. Livingston National Bank*, 11 Mont. 351.—*Knatz v. Wise*, 555.

WAIVER.

Of objections to complaint and information, see CRIMINAL LAW, 2.
Of notice of nonpayment, see NEGOTIABLE INSTRUMENTS, 2.

WARRANT.

Form of school, see *SCHOOLS*, 1.

Forgery of city, see *CRIMINAL LAW*, 15, 16, 17.

WARRANTY.

Sufficiency of evidence in action for breach of, see *NEW TRIAL*, 10.

WATERS.

Damages from overflow, see *NEGLIGENCE*, 8, 9, 10, 11.

In an action to determine priority to the use of the waters of a stream it is error to render judgment for the defendants for costs where it appeared from the special findings that while plaintiff and defendants derived title, with the water appurtenant, from a common grantor, plaintiff's deed was executed and recorded long prior to defendants'; that at the time of defendants' purchase plaintiff had a ditch carrying 200 inches which he used during the irrigating season; that 160 inches were necessary to properly irrigate plaintiff's ranch; that the water was conducted upon the land at the time of plaintiff's purchase and he had continued to use it; that defendants had not used the water in question for any beneficial purpose for five consecutive years before the commencement of the action,—since the findings warranted a judgment only for the plaintiff.—*Kimpton v. Jubilee Placer Min. Co.*, 379.

WITNESS.

Sufficiency of evidence to impeach, see *CRIMINAL LAW*, 12.

Testimony of deceased, see *CRIMINAL LAW*, 20.

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